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# TRANSCRIPT OF RECORD

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [REDACTED] 1926

No. [REDACTED] 236

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INTERNATIONAL STEVEDORING COMPANY, PETITIONER,

vs.

R. HAVERTY

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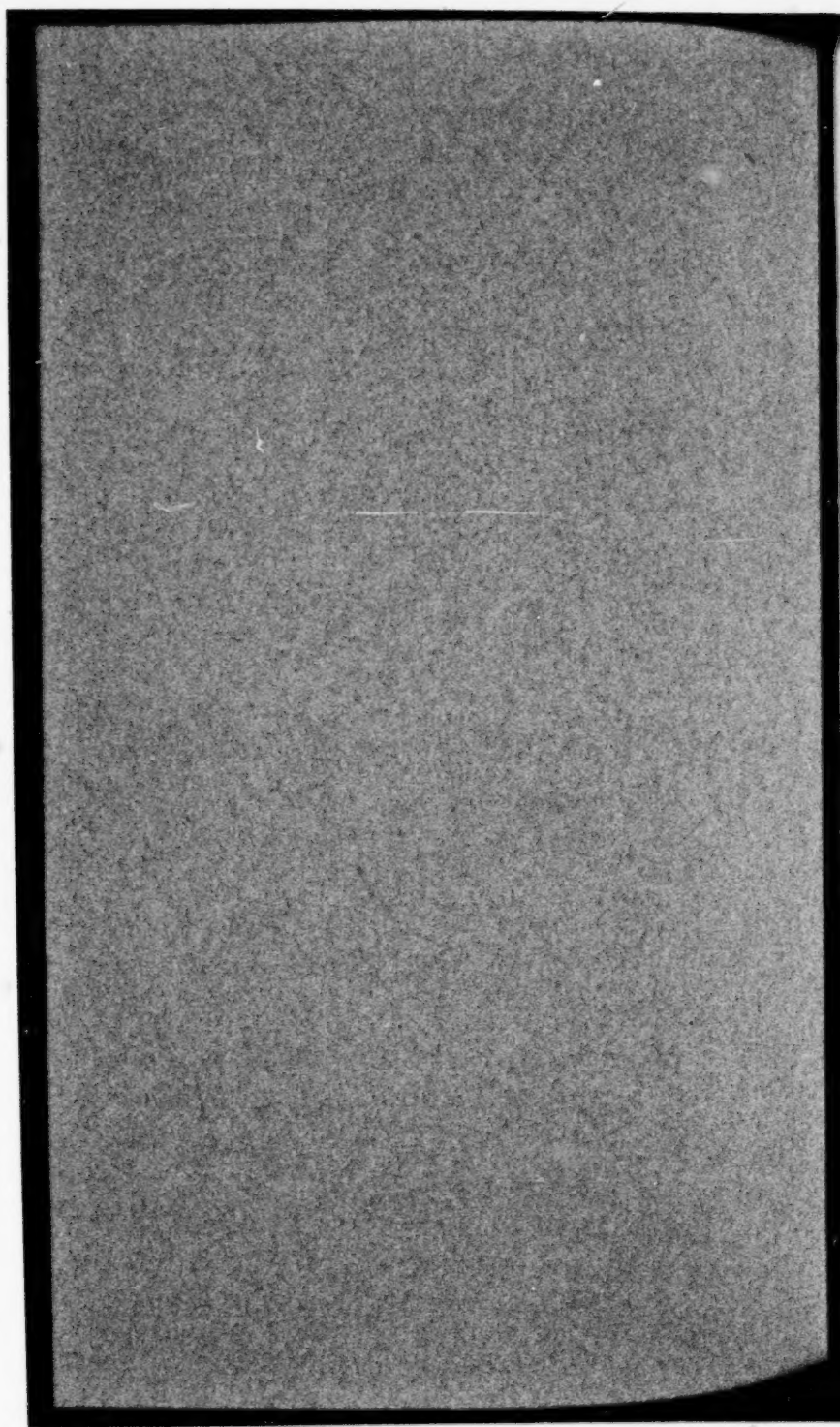
ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE  
OF WASHINGTON

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PETITION FOR CERTIORARI FILED OCTOBER 29, 1926

CERTIORARI GRANTED NOVEMBER 29, 1926

(31,512)





( )

# SUPREME COURT OF THE UNITED STATES

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[fol. 1] **IN THE SUPREME COURT OF WASHINGTON**

No. 19044

R. HAVERTY, Plaintiff-Respondent,

vs.

INTERNATIONAL STEVEDORING COMPANY, a Corporation, Defendant-Appellant

**PRÆCIPE FOR TRANSCRIPT OF RECORD**

To the Clerk of the above-entitled court:

Will you please prepare a Transcript of the Record on file in the above entitled court to be filed with an application for a Writ of Certiorari to the Supreme Court of the United States, containing the following:

1. Transcript of Pleadings.
2. Statement of Facts.
3. Supplemental Transcript.
4. Departmental Opinion.
5. Order Granting Rehearing.
6. Opinion En Banc.
7. Certificate.

Stephen V. Carey, R. E. Bigham, Alfred J. Schweppe, Attorneys for Appellant, 508 Central Building.

[fol. 2] [File endorsement omitted]

**IN SUPERIOR COURT OF WASHINGTON FOR KING COUNTY**

No. 169,480

R. HAVERTY, Plaintiff,

vs.

INTERNATIONAL STEVEDORING COMPANY, a Corporation, and JOHN DOE DOERSON (His True Christian Name Being Unknown), Defendants

**BILL OF COMPLAINT—Filed Sept. 26, 1923**

For cause of action against the defendants and each of them plaintiff alleges:

## I

At all times hereinafter mentioned the defendant International Stevedoring Company was and is now a corporation, duly organized and existing under and by virtue of the laws of the State of Washington, with its principal place of business in Seattle, said State. That it was and is engaged in the business, among other things, of loading cargo on vessels.

## II

That on the 21st day of May, 1923, the plaintiff was employed by the defendant corporation to assist in the loading of a cargo of wool on the Steamer Andrea Luchenbach, and was stationed in the lower hold of said ship in No. 8 hatch. That the said steamer was afloat on the waters of Puget Sound, and tied to pier 41, Seattle, Washington.

## III

That the loading of said wool was done by the use of a sling, which held taught 4 bales of wool, each weighing between 300 and 400 pounds. The sling was fastened to some hooks attached to wire cables, which cables ran thru some pulleys on booms onto and rolled around a drum or steam winch. This winch was operated by steam and under the control of a winch driver. That the winch driver was in the sole control, thru the said apparatus, of the lowering and lifting of each sling load of wool. On the day and time in question the winch driver was in the employ of the defendant corporation. That one John Doe Doerson, his true christian name being unknown, was the winch driver.

## IV

That it was the duty of said winch driver to drop alternate loads on the side where plaintiff was working. But no load was to be lowered until the bales of a previous load had been taken away and piled in the hold of said ship. It was his duty to watch this process. It was his further duty to notify or signal to the plaintiff, by shouting "lookout below" when a load was to be lowered.

## V

That it was the duty and custom of stevedoring companies, including this defendant corporation, to employ a hatch tender, whose duty it was to superintend the said loading, and to give the said signals. On the day and time in question the company failed and neglected to have supervising said loading such a person.

## VI

That on the said 21st day of May, 1923, the plaintiff while he was working on a previous load, was hit by a load of wool. The said

winch driver without any warning to the plaintiff, carelessly and negligently dropped another load of wool, weighing between 1,200 and 1,600 pounds on the head and back of this defendant. Plaintiff was violently knocked down on the deck, and rendered unconscious.

## VII

That he was picked up in an unconscious condition and sent to a hospital, where he was confined in bed for a period of three weeks, and treated by a physician. That the injuries and bruises, together with their effects, (caused by the negligence of the defendants) consisted of the following: The muscles, tendons, ligaments of the spine over the lumbar region, with a large swelling over that area; with a great deal of intra-muscular and subcutaneous hemorrhages, causing a large amount discoloration. That he was in constant pain and is not now free entirely from pain and suffering as a result of said injuries. That said injuries are of a permanent nature, that he will always have a weak spine. That he will never be able to work [fol. 4] at his former employment, to-wit, as a longshoreman; that hard work, and exercises of a sportful nature, which he had been fond of, will be prohibitive. That he will be compelled to wear an elastic bandage for the rest of his life, without which any kind of employment or exertion would be impossible. That he is 23 years of age, and prior to the injuries complained of was in very good health. That his mentality has been impaired as a result of said injuries, said injuries operating as a check, a nervous check, to the carrying on of any work, he tiring very easily. That as a result of said injuries plaintiff has been damaged in the sum of \$15,000.00.

## VIII

For the past three years plaintiff has been employed as a longshoreman. That during the summer months, May, June, July, August, and September, his earning capacity was \$180.00 per month, which sum he was earning immediately prior to the injuries complained of. That on account of said injuries he has been damaged in the sum of \$720.00, four months loss of wages.

## IX

That plaintiff incurred expenses of the following nature, to-wit, doctors, ambulance, and medicinal, amounting to \$260.00, which he is legally obligated to pay.

Wherefor, plaintiff prays for judgment against the defendants and each of them in the sum of \$15,980.00, and for all his costs and disbursements, incurred.

Mark M. Litchman, Attorney for Plaintiff.

Sworn to by R. Haverty. Jurat omitted in printing.



[fol. 5] IN SUPERIOR COURT OF KING COUNTY

[Title omitted]

.. AMENDED BILL OF COMPLAINT—Filed April 30, 1924

For cause of action against the said defendant, the plaintiff, R. Haverty, alleges:

### I

That now and at all times herein named the defendant, International Stevedoring Company, was a corporation organized and doing business under the laws of the State of Washington, with its principal office and place of business in Seattle, Washington; and that among other things it was engaged in loading cargo on sea-going vessels as a stevedoring company.

### II

That on May 21st, 1923, the plaintiff was employed by the defendant corporation as a stevedore to assist in loading a cargo of wool on the Steamer "Andrea Luchenbach," a seagoing vessel then afloat in the waters of Puget Sound, and tied to pier #41, at Seattle, King County, State of Washington.

### III

That the loading of said vessel was done in the usual manner, to-wit, by the use of a sling fastened to some hooks attached to wire cables; that said cables ran thru some pulleys on booms and rolled around a drum which constitutes the steam winch. This winch was operated by a winch driver under the control and direction of a hatch-tender, Lee Carls, then and there in the employ of the defendant and as such its vice-principal; that said hatch-tender had control, superintending and direction of said winch, and of the loading of said sling and the lifting thereof over said vessel and thru [fol. 6] the hatch down into the hold of said vessel; that said hatch tender did so by the giving of signals and commands to the winch driver and to others under his direction; that at the time stated plaintiff was working in the lower hold of said vessel in hatch No. 8 with other stevedores; that as herein stated the defendant had full charge and control of the loading of said vessel, and thru said hatch tender directed said stevedores including plaintiff, and it was his function and duty to superintend and control the loading of said sling and the lowering of its load into the hold and to signal the stevedores and plaintiff thereof; that at the time stated wool was being loaded into the lower hold of said vessel where plaintiff was working; that the said wool was handled by the loading of the sling and by the hatch tender signaling to the plaintiff in the hold, "lookout below," then and there meaning that the load was to be lowered, and immediately would command the winch driver to lower the load; that at the time and place stated the plaintiff was engaged in stowing away

or placing a load of wool when without any warning or signal or notice of any kind from the hatch tender or any one else plaintiff was suddenly struck by a load of wool weighing between 1,200 and 1,800 pounds and injured in the manner and to the extent herein-after set forth, which said injuries resulted directly and proximately from the carelessness and negligence of the hatch tender in failing to give signal of the lowering of said load of wool; that it was usual and customary, and ordinary safety and prudence demanded, not to lower a load until a previous load has been cared for and piled away; that said hatch tender negligently failed to ascertain, as was his duty, whether plaintiff and those working with him had piled away the previous load, and that the load which struck and injured plaintiff was lowered before he had completed the stowing and the handling of the previous load.

#### IV

That plaintiff was struck with great force and violence in the back rendered unconscious, and injured as follows: the spine was injured, and the muscles, ligaments and tendons of the back bruised and sprained accompanied by a large swelling over the lumbar region; that he suffered and sustained a great deal of intra-muscular and [fol. 7] subcutaneous hemorrhages, causing large areas of discoloration. That he sustained a severe nervous shock from which he has suffered great pain and anguish, and still suffers; that he has suffered great physical pain and anguish, and still suffers; that he was confined to the hospital for about three weeks, and was incapacitated for all kinds of labor for over eight months; that at present he is able to do his work only with considerable pain and is compelled to wear an elastic bandage, and his capacity to labor has been impaired; that prior to his injury he was in good health and was strong. That his damages by reason of mental and nervous and physical suffering and injuries is five thousand dollars (\$5,000.00).

#### V

That in addition to the foregoing he has sustained the following actual damages and losses, to-wit: loss of eight and one half months' wages at \$180.00 a month (which he was earning approximately when injured) is \$1,530.00; physicians, hospital and medicinal, \$260.00; which he is obligated to pay; total actual losses, \$1,790.00; or a total loss and damages of \$6,790.00 for which the plaintiff is entitled to recover judgment from the defendant.

Wherefore, the plaintiff demands judgment of and from the defendant in the full sum of six thousand seven hundred ninety dollars (\$6,790.00) together with his costs and disbursements herein.

Mark M. Litchman, Thos. R. Horner, Attorneys for Plaintiff.

Sworn to by R. Haverty. Jurat omitted in printing.

[File endorsement omitted.]

[Title omitted]

## ANSWER TO AMENDED BILL OF COMPLAINT—Filed May 2, 1924

Comes now International Stevedoring Company, a corporation, defendant, and for answer to the plaintiff's amended complaint, admits, denies and alleges as follows:

## I

Admits paragraph I of said amended complaint.

## II

Admits paragraph II of said amended complaint.

## III

Answering paragraph III of said amended complaint, the defendant admits that the loading of said vessel was done in the usual manner by the use of a sling fastened to a cargo hook, which hook was attached to wire cables; that said cables ran through blocks or pulleys attached to booms and thence around the drums of certain steam winches; that said winches were operated by a winch driver; denies that at the time of plaintiff's alleged injury, said winch driver was under the control and direction of the hatch tender; admits that the hatch tender, Lee Carls, was then in the employ of the defendant; denies that said hatch tender was a vice principal; denies that said hatch tender had the control or superintendence or direction of said winch; admits that the hatch tender had the superintendence of the loading of the sling and the lifting thereof over the side of the vessel; denies that the said hatch tender had the superintendence and direction of the load into the hold of the vessel; admits that the hatch tender, to the extent that he had superintendence of the loading of [fol. 9] said vessel as heretofore admitted, exercised such superintendence by giving signals and commands to the winch driver; denies that the said hatch tender gave directions to others; admits that at the time stated in said amended complaint, the plaintiff was working in the lower hold of said vessel in hatch No. 8 with other stevedores; denies that the defendant had full charge and/or control of the loading of said vessel; denies that through the hatch tender the defendant directed said stevedores including the plaintiff; admits that it was the function and duty of the hatch tender to superintend or control the loading of the sling; denies that it was the function or duty of the hatch tender to superintend or control the lowering of the load into the hold or to signal the said stevedores or the plaintiff; admits that at the time stated in said amended complaint, wool was being loaded into the lower hold of said vessel where plaintiff was working; admits that said wool was handled by the loading of the

slung; denies that the said loading was done by the hatch tender signalling to the plaintiff as alleged or otherwise; admits that at the time and place stated, the plaintiff and fellow workmen were engaged in receiving and stowing away bales of wool; denies that the plaintiff was struck by a load of wool without warning; denies that the load of wool therein referred to weighed between 1,200 to 1,800 pounds; admits that the plaintiff was struck; for want of knowledge or information sufficient to form a belief as to the extent of plaintiff's injuries, if any, denies that the plaintiff was injured as in said paragraph alleged; denies that the injuries, if any, sustained by the plaintiff resulted directly or proximately from carelessness or negligence of the hatch tender in failing to give a signal or otherwise of the lowering of said load of wool or otherwise; denies that it was usual or customary or that ordinary safety or prudence demanded that a load should not be lowered until a previous load had been cared for or piled away; denies that the hatch tender negligently failed to ascertain whether the plaintiff or those working with him had piled away the previous load or that it was his duty to do so; denies that the load which struck the plaintiff was lowered before he had completed the handling and stowing of the previous load; denies each and every allegation in paragraph III not herein expressly admitted.

[fol. 10]

#### IV

Answering paragraph IV of said amended complaint, the defendant admits that the plaintiff was struck by a certain load then being lowered into the hold, but for want of information sufficient to form a belief as to the truth thereof, the defendant denies each and every other allegation in said paragraph IV and particularly denies that the plaintiff has sustained damage in the sum of Five thousand Dollars (\$5,000.00) or in any other sum whatsoever.

#### V

For want of information sufficient to form a belief as to the truth thereof, the defendant denies each and every allegation in paragraph V of said amended complaint.

#### First Affirmative Defense

Further answering said amended complaint and by way of a first affirmative defense thereto, the defendant alleges that the injuries and damages, if any, suffered or sustained by the plaintiff were directly, proximately and solely caused by negligence on the part of the plaintiff.

#### Second Affirmative Defense

Further answering said amended complaint and by way of a second affirmative defense thereto, the defendant alleges that the injuries and damages, if any, suffered or sustained by the plaintiff were directly, proximately and solely caused by risks and hazards in-

herent in plaintiff's occupation as stevedore and the plaintiff assumes the dangers incident thereto.

### Third Affirmative Defense

Further answering said amended complaint and by way of a third affirmative defense thereto, the defendant alleges that the injuries and damages, if any, suffered or sustained by the plaintiff directly, proximately and solely caused by the negligence of fellow servants of the plaintiff.

Wherefore, having fully answered said amended complaint, the [fol. 11] defendant prays that the plaintiff take nothing in this action and that the same be dismissed and the defendant recover its costs herein.

R. E. Bigham, Stephen V. Carey, Attorneys for Defendant.

[File endorsement omitted.]

[fol. 12] Due and timely service of the foregoing answer by receipt of a — thereof is hereby acknowledged this — day of May, 1924.

Mark M. Litchman & Thos. R. Horner, Attorneys for Plaintiff.

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[fol. 13] IN SUPERIOR COURT OF KING COUNTY

[Title omitted]

DEFENDANT'S EXCEPTIONS TO EVIDENCE AND ORDER ALLOWING SAME—Filed May 5, 1924

The defendant excepts to the refusal of the Court to sustain its challenge to the evidence at the close of plaintiff's case, and at the close of all the evidence on the following grounds:

1st. That no facts are shown constituting liability under the laws and decisions of the State of Washington.

2nd. That under the undisputed facts, no liability has been shown under the maritime law and the refusal of the Court to sustain said challenges and each of them denies to the defendant its rights and immunities under the general maritime law and the Constitution of the United States.

The foregoing exception allowed in open Court during the course of the trial this 5th day of May, 1924.

Calvin S. Hall, Judge.

[File endorsement omitted.]



[fol. 14] IN SUPERIOR COURT OF KING COUNTY

[Title omitted]

DEFENDANT'S REQUESTED INSTRUCTIONS TO JURY—Filed May 5,  
1924

The defendant respectfully requests the court to give the following instructions to the Jury:

[fol. 15]

I

It is established by the evidence and admitted by both parties to this case that at the time of the alleged injury to the plaintiff, he was employed by the defendant and working as a stevedore loading cargo in the hold of the sea-going vessel, "Andrea Luckenbach," then afloat in the waters of Puget Sound in the Port of Seattle, King County, Washington. You are advised that the plaintiff while so employed and working in the course of his employment, was engaged in a maritime service and the rights and liabilities of the plaintiff and defendant are therefore governed exclusively by the maritime law. You are further advised that under the maritime law a stevedore in the situation of the plaintiff cannot hold the employer liable for damages sustained in consequence of the negligence of a fellow servant. Fellow servants are workmen engaged in the same general undertaking, that is, workmen employed by the same employer, engaged in the same common enterprise, employed to perform duties tending to accomplish the same general purpose. Workmen are fellow servants if the services of each in his particular sphere or department are directed to the accomplishment of the same general end. All members of the stevedoring crew working aboard the ship including the winchdriver and the hatch tender are fellow servants under the maritime law. As it conclusively appears in this case that the plaintiff, if not injured as a result of his own negligence, was injured in consequence of the negligence of the winchdriver or the negligence of the hatch tender, or the concurring negligence of both winchdriver and hatch tender, and as these workmen were fellow servants of the plaintiff under the maritime law, you are instructed to return a verdict for the defendant.

Atlantic Transport Co. vs. Imbrovek, 234 U. S. 52; 58 L. Ed. 1208.

Southern Pacific Co. vs. Jensen, 244 U. S. 205; 61 L. Ed. 1086.

Chelantes vs. Luckenbach S. S. Co. 247 U. S. 372; 62 L. Ed. 1171.

Carlisle Packing Co. vs. Sandanger, 259 U. S. 255; 66 L. Ed. 927.

[fol. 16] Heino vs. Libby, 116 Wash. 148.

New England Ry. vs. Conroy, 175 U. S. 327.

The Hoquiam, 253 Fed. 627.

Western Fuel Co. vs. Garcia, 260 Fed. 839.

State of Washington vs. Dawson, — U. S. —.

[fol. 17] Without waiving the foregoing request for an instructed verdict, but in the event that the Court shall refuse to grant same, then defendant requests that the following instructions be given to the jury.

## II

You are instructed that a workman cannot hold his employer liable for injuries sustained in whole or in part in consequence of his own negligence. The failure of the workman to take any precaution for his own safety which an ordinarily prudent and careful man similarly situated would take is contributory negligence. A workman in a hazardous employment is not justified in taking for granted what a reasonably prudent and careful man would investigate as a means of self preservation. The failure to observe those things which a reasonably prudent and careful man under similar circumstances would observe amounts to contributory negligence and bars a recovery against the employer. The amount of care a workman is required by law to use for his own protection is proportionate to the dangers of the particular place and situation, the greater the danger the greater the care required.

[fol. 18]

## III

An experienced workman assumes as part of his employment all the risks and hazards naturally incident to the work in which he voluntarily engages and if injured in consequence of such risks, he cannot recover against the employer. The employee assumes all the risks and dangers apparent to him and as well all risks and dangers, which in the exercise of reasonable care and caution should become apparent to him. The employer is not required to warn an experienced workman of dangers which would become at once apparent to the workman by the use of his own faculties.

[fol. 19]

## IV

If you find that the plaintiff's injury was caused by his own negligence, or by the negligence of the winchdriver or by the concurring negligence of the plaintiff and the winchdriver, it is your duty to return a verdict for the defendant.

[fol. 20]

## V

Even though you should find that the hatch tender was negligent in the performance of his duties, or some of them, still if you believe that the injury to the plaintiff was caused by the subsequent

independent negligence of the winch driver, it is your duty to return a verdict for the defendant.

R. E. Bigham, Stephen V. Carey, Attys. for Defendant.

[File endorsement omitted.]

[fol. 21] IN SUPERIOR COURT OF KING COUNTY

[Title omitted]

VERDICT—Filed May 5, 1924

We, the Jury in the above entitled cause, do find for the plaintiff in the sum of Thirty five hundred Dollars (\$3,500.00).

A. M. Asselstine, Foreman.

Judgment Number 73909 Entered in Execution Docket Vol. 72 page 165.

[File endorsement omitted.]

[fol. 22] IN SUPERIOR COURT OF KING COUNTY

[Title omitted]

DEFENDANT'S EXCEPTIONS TO INSTRUCTIONS TO JURY—Filed May 8, 1924

Comes now the defendant, International Stevedoring Company, a corporation, and excepts to the instructions given by the Court to the jury and to the refusal of the Court to instruct the jury as requested by the defendant, as follows:

# I

The defendant excepts to that portion of the Court's charge by which the Court instructed the jury, "Likewise, the burden is on the defendant to establish by a fair preponderance of the evidence the material allegations of its affirmative defenses," in view of the fact that later on in the charge the Court in effect instructed the jury that even though the jury should find the defenses of assumed risk and fellow servant established in favor of the defendant, the jury should disregard said defenses and each of them, there'y putting upon the defendant the obligation of establishing its said affirmative defenses by a preponderance of the evidence and depriving the defendant of the benefit of said defenses and each of them if thus established.

## II

The defendant excepts to that portion of the Court's charge by which the Court instructed the jury as follows: "It is further undisputed by the evidence that there was at the same time, engaged on the deck of the vessel, a hatch tender, that he had previously during [fol. 23] that day and immediately prior to the time the plaintiff was injured, had been giving signals or warnings to the men employed in the hold of the vessel of the approach of the slingloads of freight"; on the ground that said statement is contrary to the facts proven in the case and the prejudicial comment upon the evidence.

## III

The defendant excepts to that portion of the Court's charge by which the Court instructed the jury as follows: "If you find from the evidence that the failure to give this signal by the hatchtender was the proximate cause of the injury,—that is, an efficient cause but for which plaintiff would not have been injured,—if that was the proximate cause of the injury and damage to plaintiff, then your verdict must be for the plaintiff;" on the ground that said instruction is erroneous and contrary to law and particularly that said instruction is contrary to the general maritime law and deprived the defendant of its rights and immunities under that law and under the constitution of the United States.

## IV

The defendant excepts to that portion of the Court's charge by which the Court instructed the jury, "I will withdraw from your consideration the questions raised by two of the affirmative defenses: First, as to fellow servant; you are not to consider that in this case, because it is not a defense. Second, neither are you to consider the defense that this was one of the hazards incident to his employment that he assumed; that is not in the case", for the reason that said instruction is contrary to law, is a comment upon the facts of the case, and particularly that said instruction is contrary to the general maritime law and deprived the defendant of its rights and immunities under the general maritime law and the constitution of the United States.

The defendant further excepts to said portion of the charge on the ground that there was, in the case, evidence from which the jury could have found the defense of fellow servant established under the [fol. 24] general law of master and servant as established by the decisions of the Supreme Court of Washington.

## V

The defendant excepts to that portion of the Court's charge by which the Court instructed the jury that, in computing the amount of damages, if any, to be awarded the plaintiff, the jury should take into consideration "the pain and suffering that he (plaintiff) will

reasonably undergo in the future", on the ground that said portion of the charge is without the scope of the evidence, there being no evidence whatever from which the jury could find that the plaintiff would suffer any pain or suffering "in the future".

## VI

The defendant excepts to that portion of the Court's charge by which the Court told the jury that, in computing the amount of damages to be awarded the plaintiff, the jury should take into consideration the loss of earnings "that he (plaintiff) reasonably may sustain in the future", on the ground that said portion of the charge is without the scope of the evidence, there being no evidence whatever of any probable loss of earnings "in the future".

## VII

The defendant excepts to the failure and refusal of the Court to instruct the jury to return a verdict in favor of the defendant as requested by the defendant's requested instruction I on the grounds and for the reasons stated in said requested instruction, and particularly on the ground that the refusal of the Court to grant such request deprived the defendant of its rights and immunities under the general maritime law and the constitution of the United States.

## VIII

The defendant excepts to the failure and refusal of the Court to give to the jury the defendant's requested instruction II, reading as follows:

"You are instructed that a workman cannot hold his employer liable for injuries sustained in whole or in part in consequence of his own negligence. The failure of the workman to take any precaution for his own safety which an ordinarily prudent and careful man similarly situated would take is contributory negligence. A [fol. 25] workman in a hazardous employment is not justified in taking for granted what a reasonably prudent and careful man would investigate as a means of self preservation. The failure to observe those things which a reasonably prudent and careful man under similar circumstances would observe amounts to contributory negligence and bars a recovery against the employer. The amount of care a workman is required by law to use for his own protection is proportionate to the dangers of the particular place and situation, the greater the danger the greater the care required."

## IX

The defendant excepts to the failure and refusal of the Court to give to the jury the defendant's requested instruction III, reading as follows:



"An experienced workman assumes as part of his employment all the risks and hazards naturally incident to the work in which he voluntarily engages and if injured in consequence of such risks, he cannot recover against the employer. The employee assumes all the risks and dangers apparent to him and as well all risks and dangers, which in the exercise of reasonable care and caution should become apparent to him. The employer is not required to warn an experienced workman of dangers which would become at once apparent to the workman by the use of his own faculties."

## X

The defendant excepts to the failure and refusal of the Court to give to the jury the defendant's requested instruction IV, reading as follows:

"If you find that the plaintiff's injury was caused by his own negligence, or by the negligence of the winchdriver or by the concurring negligence of the plaintiff and the winchdriver, it is your duty to return a verdict for the defendant."

## XI

The defendant excepts to the failure and refusal of the Court to give to the jury the defendant's requested instruction V, reading as follows:

"Even though you should find that the hatch tender was negligent in the performance of his duties, or some of them, still if you believe that the injury to the plaintiff was caused by the subsequent independent negligence of the winch driver, it is your duty to return a verdict for the defendant."

R. E. Bigham, Stephen V. Carey, Attorneys for International Stevedoring Company, a Corporation, Defendant.

Service of the foregoing exceptions by receipt of a copy thereof is hereby acknowledged this 7th day of May, 1924.

Mark M. Litchman, Thos. R. Horner, Attys. for Plaintiff.

[File endorsement omitted.]

[fol. 26]

## Certificate

I, Calvin S. Hall, the judge of the Superior Court of the State of Washington, for King County, before whom the above entitled and numbered cause was tried, do hereby certify that the foregoing defendant's exceptions were duly filed before the hearing of the defendant's motion for a new trial herein and on the argument of said motion for a new trial and before the decision of the Court therein,

said exceptions and each of them were called to the attention of the Court by the defendant's attorneys.

Done in open Court this 15th day of Aug. 1924.

Calvin S. Hall, Judge.

[fol. 27] IN SUPERIOR COURT OF KING COUNTY

[Title omitted]

DEFENDANT'S MOTION FOR JUDGMENT NOTWITHSTANDING VERDICT  
AND IN ALTERNATIVE FOR NEW TRIAL—Filed May 6, 1924

Comes now the defendant International Stevedoring Company, a corporation, and moves that notwithstanding the verdict of the Jury in favor of the plaintiff, a judgment be entered herein in favor of the defendant upon the following grounds to-wit:

### I

That no facts were proven sufficient to constitute liability under the laws and decisions of the State of Washington.

### II

That no facts were proven sufficient to constitute liability under the general maritime law, but on the contrary the facts proven in the case established the non-liability of the defendant under the general maritime law and the Constitution of the United States.

### Motion for New Trial

Without waiving the foregoing motion for judgment notwithstanding the verdict, but in the event that the court shall deny the same, then the defendant International Stevedoring Company moves that the verdict of the Jury returned and filed herein on May 5, 1924, be vacated and a new trial granted to the defendant for the following causes materially affecting the substantial rights of the defendant:

Irregularity of the proceedings of the Court and of the Jury and of the adverse party and abuse of discretion by which the defendant [fol. 28] was prevented from having a fair trial.

### II

Misconduct of the prevailing party and of the Jury.

### III

Accident or surprise which ordinary prudence could not have guarded against.

## IV

Newly discovered material evidence which the defendant with reasonable indulgence could not have discovered and produced at the trial.

## V

Excessive damages appearing to have been given under the influence of passion or prejudice.

## VI

Error in the assessment of the amount of the recovery, the same being too large.

## VII

Insufficiency of the evidence to justify the verdict and that the verdict is against law.

## VIII

Error in law occurring at the trial and excepted to at the trial by the defendant.

R. E. Bigham, Stephen V. Carey, Attorneys for defendant.

Due service of the foregoing motion for judgment notwithstanding the verdict and in the alternative for a new trial, by receipt of a true copy thereof, is hereby acknowledged this 6th day of May, 1924.

Mark M. Litchman, Thos. R. Horner, Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 29]

IN SUPERIOR COURT OF KING COUNTY

MEMORANDUM OPINION ON MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR NEW TRIAL—Filed Aug. 6, 1924

Plaintiff, a longshoreman in the employ of defendant, while stowing freight in the hold of a vessel at dock in Seattle harbor, was struck and seriously injured by a descending sling load of wool. A hatch tender was stationed near the hatch to warn the men working in the hold when a load of freight was about to be lowered. No warning was given by him when this particular sling load was lowered, and plaintiff's right to recover is based upon the negligence of the hatch tender in that particular.

The case was submitted to a jury on that issue and there was a verdict in favor of the plaintiff in the sum of \$3,500.00. Defendant company has moved for judgment in its favor, notwithstanding the verdict, on the ground that this case is governed by the maritime law, under which the hatch tender, being engaged in common service, was a fellow servant of plaintiff, and the master is not answerable for

his negligence; and that if such motion for judgment is denied, that it be granted a new trial.

It will be admitted that the maritime law controls in this case, but under the facts here the maritime law is simply the common law doctrine of fellow servant, modified by the non-delegable duty principle.

[fol. 30] The fellow servant doctrine that the master is not liable for injury to one of his servants caused by the negligence of another servant engaged in the same common employment, is a common law doctrine first advanced by the courts in England about 1837 and thereafter by the courts in this country in 1841 and 1842. It was first applied without qualification, but as time passed the courts found that unless it was modified in some particulars justice would be denied the servant in many instances, especially in the case of corporations, which can act only through agents and servants, and which soon thereafter began to take a large part in the business activity of the world.

The first modification was to make the master liable when he knowingly retained in his service an incompetent servant and another servant was injured through such incompetency. Another exception was that there are certain duties the master owes to his servant, which he is absolutely bound to perform and which he cannot delegate to another and thereby relieve himself from the results of negligent performance. One of such duties is that the master must use reasonable care in furnishing his servant a safe place within which to work. This duty is non-delegable, and if a master selects another, even though a fellow worker of the one injured, to perform that duty, such one in the performance of it ceases to be a fellow servant and becomes a vice-principal, and the master is liable for his negligence.

In the case at bar the defendant, in order to perform its duty of furnishing a safe working place for the men in the hold, had provided a hatch tender to give the men warning when a sling load was about to be lowered. The hatch tender's failure to give such warning was the failure of defendant company, and the latter is liable for the damages resulting to plaintiff because thereof.

This principle of non-delegable duty is now applied by the common law courts, both state and federal, and has been firmly established by the decisions of our Supreme Court. It is based upon sound public policy, justice and reason, and is in keeping with the progress made in the law affecting the relation between master and servant. As counsel for plaintiff aptly put it in their brief, "to apply the fellow servant doctrine of 1841, as contended for by defendant, to a recent vocation, longshoring, where the facts are undisputed that it occurred through the failure to perform a non-delegable duty, would be to make the 'world go backward' as to a longshoreman, while the 'world has been going forward' for all employees on land."

The fellow servant doctrine was adopted by the courts trying mari-

time causes and under it in admiralty actions, where the rights of seamen were involved, all the members of the crew, except possibly the captain, were held to be fellow servants. However, even if a seaman was injured by the negligence of another member of the crew, while denied his right of action in court, he was allowed the costs of his maintenance, his cure and his wages to the end of the voyage. In their later decisions the courts in admiralty cases are beginning to apply the non-delegable duty rule. But a longshoreman, engaged as the plaintiff was at the time of his injury, under the decisions of the courts is not a seaman. He is not a member of the crew, but is a land worker employed temporarily on the vessel at dock, and if he is injured, though his case may be triable in admiralty, that court in determining his right to recover applies the common law doctrine of fellow servant, as modified in the particular that the duty to furnish a safe place within which the servant is to work is a non-delegable duty, and that the master is liable for its negligent performance.

Defendant's motion for judgment notwithstanding the verdict will be denied. As to its motion for a new trial, I believe that the issues in the case were properly submitted to the jury, and I will therefore deny the same.

[fol. 32] I have not cited the cases supporting the principles of law hereinabove stated, but they may be found in the list of authorities submitted by plaintiff.

Calvin S. Hall, Judge.

[File endorsement omitted.]

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[fol. 33] IN SUPERIOR COURT OF KING COUNTY

[Title omitted]

JUDGMENT—Filed Aug. 15, 1924

This cause came on regularly for trial on the 5th day of May, 1924, the plaintiff appearing in person and by his attorneys Mark M. Litchman, Esq. and Thomas R. Horner, Esq. and the defendant appearing by Stephen V. Carey, Esq. and Roy E. Bigham, Esq. its attorneys; a jury of twelve qualified persons was duly empaneled and sworn to try the cause; evidence was introduced on behalf of the plaintiff and on behalf of the defendant and the jury having been instructed as to the law by the court and having heard the arguments of counsel, retired to consider its verdict and thereafter returned into court with its verdict, wherein and whereby it found in favor of the plaintiff and against the defendant in the sum of Thirty-five Hundred Dollars (\$3,500.00); thereafter and within the time provided by law, the defendant moved for judgment notwithstanding the verdict and in the alternative for a new trial and the court having considered said motions and being fully advised in the premises, now orders, adjudges and decrees as follows:



## I

That the defendant's motion for judgment notwithstanding the verdict of the jury, be and it is hereby denied, to which ruling the defendant excepts and an exception is allowed.

## II

That the defendant's motion for a new trial, be and it is hereby [fol. 34] denied, to which ruling the defendant excepts and an exception is allowed.

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That in accordance with the verdict of the jury, the plaintiff do have and recover from the defendant the sum of \$3,500.00, together with costs herein to be taxed as provided by law, to which ruling the defendant excepts and an exception is allowed.

Done in open court this 15th day of August, 1924.

Calvin S. Hall, Judge.

[File endorsement omitted.]

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[fol. 35] IN SUPERIOR COURT OF KING COUNTY

[Title omitted]

NOTICE OF APPEAL—Filed Sept. 9, 1924

To R. Haverty, plaintiff, and to Mark Litchman, Esq., and Thomas R. Horner, Esq., his attorneys:

You and each of you will please take notice that the defendant International Stevedoring Company, a corporation feeling aggrieved by the decision and judgment of the Superior Court of the State of Washington in the above entitled and numbered cause, appeals from said decision and judgment to the Supreme Court of the State of Washington.

The Judgment from which the said defendant International Stevedoring Company, a corporation, so appeals is that certain judgment entered and filed herein on the 15th day of August, 1924, overruling the defendant's motion for judgment notwithstanding the verdict; overruling the defendant's alternative motion for a new trial and giving the plaintiff judgment on the verdict against the defendant in the sum of \$3,500.00, together with costs.

The defendant appeals from said judgment and from each and every part thereof.

Dated at Seattle, Washington, this 9th day of September, 1924.

International Stevedoring Company, a Corporation, by R. E. Bigham, Stephen V. Carey, Its Attorneys.

Service of the foregoing notice of appeal by receipt of a copy thereof, together with a copy of the defendant's appeal and supersedeas bond is hereby acknowledged this 9th day of September, [fols. 36 & 37] 1924.

Mark M. Litchman, Thos. R. Horner, Attorneys for R. Haverty, Plaintiff.

[File endorsement omitted.]

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[fol. 38] BOND ON APPEAL FOR \$500.00—Approved; omitted in printing

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[fol. 39] IN SUPERIOR COURT OF KING COUNTY

[Title omitted]

NOTICE OF FILING STATEMENT OF FACTS—Filed Sept. 3, 1924

To R. Haverty, plaintiff, and to Mark Litchman, Esq., and Thomas R. Horner, Esq., his attorneys:

You and each of you will please take notice that the defendant International Stevedoring Company, a corporation, heretofore on the 3rd day of September, 1924, filed with the Clerk of the above entitled court its proposed Statement of Facts on appeal to the Supreme Court of the State of Washington from the judgment entered in the above entitled action on the 15th day of August, 1924, in favor of the plaintiff and against the defendant and a copy of said proposed Statement of Facts is herewith served upon you.

R. E. Bigham, Stephen V. Carey, Attorneys for International Stevedoring Co., a Corporation.

Service of the foregoing notice by receipt of a copy thereof, together with a copy of the defendant's said proposed Statement of Facts, is hereby acknowledged this 4th day of September, 1924.

Mark M. Litchman, Thos. R. Horner, Attorneys for Plaintiff.

[File endorsement omitted.]

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[fol. 40] IN SUPREME COURT OF KING COUNTY

CLERK'S CERTIFICATE

I, George A. Grant, County Clerk of King County and ex-officio Clerk of the Superior Court of the State of Washington in and for

King County, do hereby certify that the foregoing is a full true and correct transcript of so much of the record and files in Cause No. 169480, entitled R. Haverly vs. International Stevedoring Company, a corporation, as I have been directed by the Appellant to transmit to the Supreme Court of the State of Washington.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court this 13th day of November, 1924.

George A. Grant, County Clerk, etc., by R. W. Flemming,  
Deputy. (Seal of Superior Court.)

[fol. 41] IN SUPERIOR COURT OF KING COUNTY

[Title omitted]

MOTION TO FILE AMENDED COMPLAINT—Filed Apr. 30, 1924

Comes now the plaintiff, by Mark M. Litchman and Thos. R. Horner, his attorneys, and moves the court for an order allowing him to file his amended complaint hereto attached, for the reasons set forth in the accompanying affidavit.

Mark M. Litchman, Thos. R. Horner, Attorneys for Plaintiff.

STATE OF WASHINGTON,  
County of King, ss:

Mark M. Litchman, being first duly sworn, on his oath says: That when he prepared the complaint in this action he did so upon data which he had obtained after consultation and inquiry of his client; that altho affiant at the time thought he had a correct conception of the facts he very recently learned, after consultation with the other witnesses, that he misunderstood his client, and he forthwith amended the complaint to conform with what he thinks is the evidence.

Mark M. Litchman.

Subscribed and sworn to before me this 28th day of April, 1924. Thos. R. Horner, Notary Public in and for the State of Washington, Residing at Seattle.

To the above named defendant, International Stevedoring Co., a corporation and to Roy E. Bigham, its attorney:

Please take notice that on May 1st, at 9:30, before the beginning of the trial of this case, the undersigned will move the Presiding Judge to allow the filing of the Amended complaint a copy of which is herewith served upon you.

Mark M. Litchman, Thos. R. Horner, Attorneys for Plaintiff.

[File endorsement omitted.]

## [fol. 42] IN SUPERIOR COURT OF KING COUNTY

## CLERK'S CERTIFICATE

I, George A. Grant, County Clerk of King County and ex-officio Clerk of the Superior Court of the State of Washington in and for King County, do hereby certify that the foregoing is a full, true and correct transcript of so much of the record and files in cause No. 169480, entitled R. Haverly vs. International Stevedoring Company, a corporation, as I have been directed by the Respondent to transmit to the Supreme Court of the State of Washington as a Supplemental Transcript of the record on appeal in said cause.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court this 5th day of February, 1925.

George A. Grant, County Clerk, etc., by R. W. Flemming,  
Deputy. (Seal.)

## [fol. 43] IN SUPREME COURT OF WASHINGTON

[Title omitted]

OPINION—Filed April 28, 1925

Respondent, as plaintiff, brought this action to recover for personal injuries, and from a verdict in his favor for \$3,500 and a judgment thereon, the defendant has appealed.

By his original complaint, the respondent alleged that on May 31, 1923, he was employed as a stevedore by the appellant and engaged in loading wool in the hold of the steamship Andrea Luckenbach in Seattle harbor, and while so engaged was injured through the negligence of the winchman who carelessly and without warning lowered a load of wool into the hold, striking the respondent, who was then engaged in stowing away the previous load, and causing the injuries complained of. In that complaint, after describing the apparatus in use, it was alleged that the winch driver was in sole control of the operations; that it was his duty to lower no load until the previous load had been taken away; to watch the process and to notify or signal the respondent when a load was to be lowered; and the negligence complained of is that "said winch driver, without any warning to plaintiff, carelessly and negligently dropped another load of wool on the head and back of this plaintiff." Thereafter, and before trial, an amended complaint was filed, leave of Court [fol. 44] having been first obtained, in which it was alleged that the winch was operated by a winch driver under the control and direction of a hatch tender, who was in the employ of the appellant, as vice-principal, and that the hatch tender had control, superintendence and direction of the winch and the operation thereof, which he exercised by giving signals and commands to the winch driver and others, and that it was his function and duty to superintend and control the loading of the sling, the lowering of its load

into the hold, and to signal those engaged in the hold in stowing away the cargo; and that it was the duty of the hatch tender to signal to the respondent and those engaged with him in the hold, before any load was lowered and only after giving such signal to direct the winch driver to lower the load; so that, in the amended complaint, the negligence alleged was that of the hatch tender and not that of the winch driver, as was charged in the original complaint. The appellant answered the amended complaint with appropriate admissions and denials, and affirmatively pleaded the defenses of contributory negligence, assumption of risk and fellow-servants.

The facts are but little in dispute, the controlling questions being whether the maritime law governs, and, if so, whether the evidence justifies a holding, as a matter of law, that the hatch tender was the fellow servant of the respondent.

In order to clearly understand the questions thus raised, the facts as shown by the testimony must be stated with some detail. It appears that the hatch is twenty-four by twenty-one feet, surrounded by a hatch coaming something like sixteen inches high. The winches are placed just forward of the hatch and the winch driver stands at these winches to operate the levers. From his position he can see into the hatch, but not all around it, as the angle of vision from his position hardly permits a full view of the bottom of the hatch. The respondent and his fellow laborers were employed at the bottom of the ship, some forty or fifty feet below the deck upon which the winches stood and where the winch driver and the hatch [fol. 45] tender had their stations. It was the duty of the hatch tender to see to the gear, have everything in order, and direct the operations. The loading operations in progress when the accident occurred were carried on in this wise: A sling, attached to a boom, was deposited upon the dock, in which was placed a load of four bales of wool, each bale weighing from four hundred to five hundred pounds, and the total load weighing from sixteen hundred to two thousand. The hatch tender standing near the rail of the vessel, supervised the fastening of the sling, and when it was loaded and in order, it was his duty to give a signal to the winch driver to raise the sling and carry its load over and above the hatch, ready for lowering. It was then the duty of the hatch tender to step to the hatch, look over the coaming into the hold, observe if the previous load had been disposed of, and then give a warning to the men engaged below by calling out, "Look out below," or words to that effect; and thereupon, and not until then, to give the winch driver directions to lower the load into the hold. The men thus warned stood back from the open hatchway until the load came within their reach, when they swung or pushed it into position to be released and deposited. The sling was then carried up by the operation of the winch and the process repeated. With reference to the particular load which caused the injury, the evidence, so far as it goes, is undisputed; but that evidence fails to show whether the load was lowered by the order of the hatch tender or whether it was lowered by the winch driver without any such order. But lowered it was, without

any warning to those engaged below, and at the time the respondent was in a stooping position, bending over the previous load in the discharge of his duties, and the descending load struck him upon the back, causing his injuries, the extent and nature of which need not now be described.

Appellant seems to contend that the winch driver was clearly the fellow servant of the respondent, and that, considering the state of the testimony just mentioned and the lack of evidence going to show that the hatch tender directed the load to be lowered, the jury should not be permitted to speculate as to which was at fault.

[fol. 46] It is further contended, also, that the hatch tender was the fellow servant of the respondent and even if there was evidence that the hatch tender was at fault, still no substantial recovery could be had.

Upon the other hand, respondent puts forth the contention that he was entitled to a safe place in which to work; that it is clearly shown that it was the duty of the hatch tender to give him a warning signal before any load was lowered; that the hatch tender was a vice-principal performing a non-delegable duty in that respect; and that the failure to cause such a signal to be given was such negligence as entitled him to recover.

The work of a stevedore, in which the respondent was engaged at the time he received the injuries which gave rise to this action, is maritime in its nature. His employment was a maritime contract, the injuries were likewise maritime injuries, and his rights must be determined by maritime laws.

*Atlantic Transport Co. vs. Imbrovek*, 234 U. S. 52.

Admitting that the maritime law applies, respondent first calls attention to the act of Congress of 1915, U. S. Compiled Statutes, 1918, Section 8337a, which reads:

"In any suit to recover damages for any injury sustained on board vessel or in its service seamen having command shall not be held to be fellow servants with those under their authority."

and the amendment of 1920 (Fed. Stat. Ann.—1920 Supp., page 227) which reads:

"Sec. 33. That section 20 of such Act of March 4, 1915 be, and is, amended to read as follows:

'Sec. 20. That any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such

actions shall be under the Court of the district in which the defendant employer resides or in which his principal office is located.'" 41 Stat. L., 1007.

[fol. 47] The first of these enactments was upheld by the Federal Supreme Court in *Panama Railroad Co. v. Johnson*, 68 Law Ed. 748, in an exhaustive and able opinion. True, in that case the injured person was a seaman and the injury was sustained while the ship was at sea; while here the injured person was a stevedore and received his injuries while on board a ship in port. But it seems to us that Congress intended to legislate in favor of all those whose occupations render them subject to maritime injuries and used the term "those" (held to mean seamen as hereinafter related) in the first act, and the word "seamen" in the second act, as broadly descriptive of all those intended to be benefited. Yet, notwithstanding our views, the circuit court of appeals, ninth circuit, in the *Hoquiam*, 253 Fed. 627, held that the 1915 act applied to merchant seamen only, and not to a longshoreman, the clause, "seamen having command shall not be held to be fellow servants with those under their authority," being construed to mean that "those" under authority means only seamen under such authority, and that a longshoreman is not included within the term "seamen." The language of the last act is "any seaman" etc., and while, as already suggested, we would so construe that term as to include all those who by their occupations are subject to maritime injuries, so as to give effect to what seems to us to be the manifest intent of Congress, yet, in the light of the case last above referred to, we may hardly do so.

It therefore becomes necessary to inquire whether the hatch tender was a fellow servant of the respondent under the maritime law. The fellow servant doctrine has been thus defined:

"The fellow servant doctrine, it will be noted, is a departure from the ancient rules of respondeat superior, whereby an employer or principal is held liable for all such acts of his employee or agent as may be said to be the product of the service, or as it usually is expressed 'within the scope of the employment.' The doctrine seems to have been suggested by an English case decided in 1837 but it was first announced as a rule of law in a case decided by the South Carolina court in 1842. The rule was received with general consent and for several decades was found not to be unadapted to the existing conditions. Like other rules of the common law it was based upon public policy or what is thought to be best for all classes of society. Public policy, it has been reasoned, requires that an employee should exercise proper care in the conduct of the business, and look to it that his collaborer does the same thing; and, when he is told that [fol. 48] this care and prudence is his only remedy against danger from the negligence of those employed with him, it not only makes him the more careful, but stimulates him to see that others exercise the same caution. 'Where servants of the same master are directly co-operating with each other in a particular business at the time of the injury, or are, by their usual duties, brought into habitual consociation, it may well be supposed that they have the power of in-



fluencing each other to the exercise of constant caution in the master's work (by their example, advice and encouragement and by reporting delinquencies to the master) in as great, and in most cases in a greater, degree than the master. If, then, each such servant knows that neither he nor his fellow servant, if injured by the other's negligence, can have redress against the master, he has such incentive to constant care, and such incentive to the exercise of his influence upon his fellow to incite him to constant care, that the well-being of society in such case does not demand that the master be made to answer. The same considerations of policy, which to avoid injuries to third persons usually demand that the master be held responsible, seem plainly not to demand it in the case of such co-servants." 18 R. C. L., pages 715 and 716.

And its modifications are treated by the same authority as follows:

"Hardly had the doctrine of fellow service come into general recognition than it became apparent that rapidly changing economic conditions rendered it impolitic—at least in unmodified form. The doctrine was the product of the economic ideals that during the latter half of the nineteenth century sacrificed much to commercial interests, and to these same ideals we owe the development of the corporation and the enlargement of the sphere of activity of corporate bodies. The questions thereupon arose whether there should be a logical extension of the doctrine to these corporations. If they were to be exonerated from liability for injuries to their employees on the score of fellow service it followed that they could be liable in no case, inasmuch as they must need act and perform their functions through individuals who have a common employer. Changed ideals dictated a modification of the doctrine. While some courts have protested that the rule in question is too firmly fixed in jurisprudence to be reversed or seriously modified by judicial decision, a great majority, being of opinion that it works an injustice in its application to the great enterprises of the present day, have been astute to engraft upon it so many modifications and qualifications that little is left of its original import. It has been said that the courts have been 'put to mighty labor and bother to administer old rules in the light of changed conditions and to put new wine of interpretation in the old bottles of the law—all with a semblance of preserving it from chaos or radical change.' The first of the qualifications of the doctrine to be generally recognized was the rule relating to the competency of coemployees. This seems to have satisfied requirements for a considerable time, but still further changes in economic conditions and public policy have dictated the principles of nondelegable duties, superior and inferior employees, and, more recently, different departments." 18 R. C. L., pages 716 and 717.

And further:

"Another exception to the fellow servant doctrine as it was originally announced embraces what have been termed 'absolute' or 'nondelegable' duties of the employer. This exception, which seems to have been invented to meet the economic change cause by



the substitution of corporations for natural persons in commercial enterprises, declares that there are certain duties which the employer is absolutely bound to perform. While the corporation may confide their performance to an inferior officer or agent, it may not escape liability thereby. If the person to whom performance is confided neglects the obligation, his negligence is still that of the corporation. It is no answer to say that the corporation selected a competent person and that such person is in other respects a fellow servant of the injured employee. In respect of these duties he cannot be a fellow servant; he is a vice principal or agent of the employer." 18 R. C. L. pages 730 and 731.

[fol. 49] The fellow servant rule appears to have been adopted by the admiralty courts from the common law, and we see no reason why the exceptions and modifications of that rule should not be held to have been adopted with the rule itself. True, we have been cited to no case where the admiralty courts have avowedly adopted the vice principal modification, but they seem to have applied it in *Alaska Pacific S. S. Co. v. Egan*, 202 Fed 837; *Pacific American Fisheries v. Hoof*, 291 Fed 306; *The Kinghorn*, 297 Fed. 621; and perhaps other cases; and it has often been recognized by the federal courts in railroad cases, and no case has been brought to our attention in which the admiralty courts have refused to recognize it. It is not like a local statute or local rule destroying the uniformity of the maritime law, but, speaking generally, it is universally recognized and nation-wide in its applicability, and therefore, its recognition has no tendency to disturb the rule as to uniformity.

We think, if the facts of this case are carefully considered, and it is recognized that respondent was working in a place and under conditions where he could do nothing for his own protection and must rely absolutely upon the performance by the master of the duty to warn him of descending loads, that the nondelegability of that duty becomes apparent and that the hatch tender, under the circumstances shown, became a vice-principal. In this connection, too, it may be said that, respondent having shown the conditions under which his work was performed and the duty of the master to give him warning, the failure to give that warning, and the consequent injury, the burden was then cast upon the appellant to show, if it could, that the fault lay with the winch driver, in that he dropped the lead without orders so to do and before warning could be given. Not having attempted to meet that burden, the instructions given by the trial court were right and the verdict cannot be disturbed.

We have considered the argument as to future pain and suffering and the claimed excessiveness of the verdict, but find nothing therein calling for further comment.

[fol. 50] The judgment is affirmed.

Concurring: "Parker, J." "Main, J."

"Tolman, C. J.", "Bridges, J.", "Askren, J."

[fol. 51]

## IN SUPREME COURT OF WASHINGTON

[Title omitted]

ORDER GRANTING REHEARING—Filed Jun. 8, 1925

The court having considered the appellant's petition and the petition and brief of amici curiæ for a rehearing en banc in the above-entitled cause:

It is ordered that a rehearing be and it is hereby granted;

And it is further ordered that the cause be set for rehearing en banc on Thursday July 16, 1925.

The clerk will mail copies of the above-mentioned petitions to counsel for respondent.

Dated this 8th day of June, 1925.

By the Court:

Warren W. Tolman, Chief Justice.

Mark M. Litchman, Bogle, Bogle & Holman, Wm. H. Graham, Grosseup & Morrow, Huffer, Hayden, Merritt, Summers & Bucey, Stephen V. Carey, Roy E. Bigham.

[File endorsement omitted.]

[fol. 52]

## IN SUPREME COURT OF WASHINGTON

[Title omitted]

OPINION ON REHEARING—Filed July 27, 1925

PER CURIAM:

Upon a rehearing en banc, a majority of the court adheres to the Departmental opinion heretofore filed herein and reported in 34 Wash. Dec. 116, 235 Pac. 360. The judgment is therefore affirmed.

[fol. 53]

## IN SUPREME COURT OF WASHINGTON

[Title omitted]

JUDGMENT—Aug. 1, 1925

This cause having been heretofore submitted to the Court upon the transcript of the record of the Superior Court of King County, and upon the argument of counsel, and the court having fully considered the same, and being fully advised in the premises, it is now, on this 1st day of August, A. D. 1925, on motion of Mark M. Litchman Esquire,

of counsel for respondent considered, adjudged and decreed, that the judgment of the said Superior Court be, and the same is, hereby affirmed with costs; and that the said R. Haverty have and recover of and from the said International Stevedoring Company and form Maryland Casualty Co. of Maryland surety the sum of \$3,500, and costs in the Superior Court, with legal interest thereon from Aug. 15th, 1924, until paid, and the costs of this action taxed and allowed at Ninety-five & 50/100 Dollars, and that execution issue therefor. And it is further ordered, that this cause be remitted to the said Superior Court for further proceedings, in accordance herewith.

[fol. 54]

IN SUPREME COURT OF WASHINGTON

[Title omitted]

PETITION TO FILE A BRIEF AMICI CURLE AND ORDER ALLOWING  
SAME

The undersigned Members of the Bar of this Court respectfully request permission to file a brief as amici curiæ in the above entitled cause upon the petition for rehearing now pending in this Court.

We have no interest in the pending case and are not concerned with the result thereof in so far as it affects the rights or liabilities of the parties themselves, but we are vitally interested in the principle of law which, as we read the decision of the Department herein, was applied to the admitted facts of the case. The question involved which we desire to discuss is that of the extent to which the so-called fellow servant doctrine has been adopted and embodied in the maritime laws, and the question of the right of this Court in applying the common law remedy to a maritime tort to add to or subtract from or in any wise alter or vary the rules of the maritime law as embodied in the ancient maritime codes and in the decisions of the admiralty courts of this country.

Bogle, Bogle & Holman, William H. Graham, Huffer, Hayden, Merritt, Summers & Bucey, Grosseup & Morrow.

Seattle, Washington.

Application allowed. Bridges, J.

[fol. 55]

IN SUPREME COURT OF WASHINGTON

[Title omitted]

PETITION FOR REHEARING BY ROBERTS & SKEEL, AMICUS CURLE

We wish most respectfully to appear as amicus curiæ and join in the petition of the appellant for a rehearing of this cause to the full bench.

1. The Court in the opinion reaffirms the doctrine that the rights of the respondent depend upon, and must be determined by the admiralty law.

2. The Circuit Court of Appeals having fixed the law of this Circuit to be that a stevedore is not a seaman, the Court followed that rule, and therefore the federal statutes, discussed at such length by respondent, have no applicability to this case.

3. Therefore the whole case resolves itself into a question of whether or not this Court will enforce the admiralty law, because there can be no question but that under the admiralty law the plaintiff and the hatchtender were fellow servants.

The Court in the opinion says:

"His employment was a maritime contract. The injuries were likewise maritime injuries, and his rights must be determined by maritime laws."

[fol. 56] January 25th, 1925, the Supreme Court of the United States rendered a decision which we believe to be decisive of the question here. *Robins Dry Dock & Repair Co. vs. Lars Dahl*, Advance Opinions Supreme Court, Feb. 2, 1925, page 192. The Court says:

"The rights and liabilities of the parties arose out of and depended upon the general maritime law, and could not be enlarged or impaired by the state statute." (There the Court cites a list of authorities.) "The jury were distinctly told that they might consider the provisions of the local law in deciding whether or not the employer was negligent. No such instruction would have been permissible in an admiralty court, and it was no less objectionable when given by the state court. The error is manifest and material." (The Court again cites list of authorities.)

Counsel argued that fellow servant doctrine was a state doctrine, originating with the common law, and later adopted by the admiralty. The Court seems to have adopted this theory and says in the opinion:

"The fellow servant rule appears to have been adopted by the admiralty courts from the common law, and we see no reason why the exceptions and modifications of that rule should not be held to have been adopted with the rule itself."

Yet after a period of more than one hundred years no case can be cited. It seems more than passing strange, if this were true, that there has been no decision in the federal courts to that effect, and now the Supreme Court of the United States, in its very last expression upon the question, says that no state statute may be considered in determining whether or not the employer was negligent, and no more may any rule of practice or custom be considered unless there is some federal statute or some federal decision authoriz-

ing it, and none has been cited. Indeed, the Court itself in the opinion says:

[fol. 57] "True, we have been cited to no case where the admiralty courts have avowedly adopted the vice principal modification."

When this Court has said that the rights of the plaintiff must be determined by the admiralty law,—and there is no question but that under the admiralty law the hatch-tender and the plaintiff were fellow servants,—and when the Court adds that it has been cited to no case where the admiralty courts have adopted the vice principal modification, how can the Court then say it will now adopt it; in the face of and directly against the admiralty law adopt a principle which the Supreme Court of the United States has since said may not be adopted.

Then the Court in the opinion continues:

"But they seem to have applied it in *Alaska Pac. S. S. Co. v. Egan*, 202 Fed. 867, *Pacific American Fisheries v. Hoof*, 291 Fed. 306, *The Kinghorn*, 297 Fed. 621, and perhaps other cases."

We most respectfully state and ask permission of the Court to show that there is nothing in any one of the three cases to justify the statement, nor to even intimate that the Court in any one of those decisions in any manner recognized or applied any modification of the fellow servant doctrine.

In all three cases the sole question involved was neglect in furnishing unsafe equipment, and in all three cases it was held that to furnish safe appliances and equipment was a non-delegable duty, and it was immaterial whether or not they were fellow servants, because even admitting that they were, that did not relieve the master from his non-delegable duty of furnishing a safe place and safe appliances.

Not one statement in any one of the three cases as to what the law [fol. 58] or rule would be in a case where the negligence alleged was that of a fellow servant.

In this case there is involved no question of an unsafe appliance or equipment, or an unsafe place. The sole question involved was whether or not a servant of the employer was negligent, not in furnishing equipment, because the employer must do that, but in the performance of his duties, and the rule applicable is entirely different from that in the three cases cited. The law is thoroughly well settled that the duty to furnish safe equipment and appliances and a safe place to work is a non-delegable duty of the master, and the question of fellow servant does not and cannot enter into it.

In this case the working place was entirely safe. It was the usual, ordinary and customary working place. No fault is found with the working place or the working equipment, the only charge of neglect being the neglect of an employee in the manner in which he did his duty.

In *Alaska Pacific Fisheries vs. Egan*, 202 Fed. 867 the Court in the opinion says:

"He alleged in his complaint that the plank was in an unsafe and dangerous condition for the use to which it was put, a condition unknown to him, which was known, or by reasonable care could have been well known to the defendant."

That is the sole charge of negligence. No question of negligence of a fellow servant, and that question was not at issue, and was not in any manner or in any sense decided in that case, and the Court held that to furnish proper appliances was a non-delegable duty, and it was immaterial whether the plank had been placed by a [fol. 59] fellow servant because it was no part of the duty of a fellow servant to furnish proper equipment, and therefore could not be delegated.

Furthermore, the Court said as to Wright, the foreman:

"There is nothing in the record to show that any act of William Wright contributed to the plaintiff's injury, unless it be the fact that he directed the plaintiff to cast off the mooring line. If it is sought to cast upon Wright the blame for failing to inspect the plank before he directed the plaintiff to perform that service, and to assert that his failure to inspect was the negligence of a fellow servant, the answer is that if it was his duty to inspect the appliances, he was charged with the performance of a duty which devolved upon the defendant itself, and the defendant cannot take advantage of his failure to discharge that duty."

In other words, the Court held in substance and effect that the question of fellow servant could not enter into the case for two reasons. Therefore there was no room nor possibility of "applying" any modification of the fellow servant doctrine.

*Pacific American Fisheries v. Hoof*, 291 Fed. 306. In this case the syllabus states:

"The duty of the master to provide for his servant a safe working place and safe appliances is positive and continuing, and cannot be delegated."

If it is the law, not only in the federal courts but we think everywhere, that the duty to furnish safe appliances, equipment and place cannot be delegated, it follows as a logical sequence that the question of fellow servant cannot be involved where the question of negligence charged is that of defective appliances and equipment. In the opinion in that case the Court said:

"The Court held that the fellow servant doctrine had no application to the case for two reasons; first because the watchman and the [fol. 60] painters and caulkers had nothing in common and were not engaged in the same general enterprise. Second, because the master failed to furnish and provide a reasonably safe working place."

It will be seen, therefore, that the question at issue here was in no way decided nor touched upon for the two reasons stated by the

Court. They were not engaged in a common enterprise under a common master, while here they were all working together in the same hatch, in the same crew, under the same direction, and there was no question of safe place. Again no chance for any "application" of the modification.

The Kinghorn, 297 Fed. 621. In the opinion the Court says:

"The reason why the draft came down so rapidly was that the man at the winch could not properly regulate the speed of descent, and the reason why he could not was that there was an improper lead from the draft to the winch drum, which could have been remedied by using appliances at hand, and which had already been employed at another winch. Libelant in the hold knew nothing of all this. He was helplessly ignorant. Yet the arrangement, or misarrangement of tackle, rendered the place where he was working unsafe every time a draft came down."

That states the entire ground of negligence alleged in that case; solely a question of safe and proper equipment, and the Court in conclusion says:

"Consequently it makes no difference whether one man or another was the representative or alter ego of the master in arranging the tackle for stowing the Kinghorn's cargo. There was a resulting violation of the non-delegable duty of furnishing libelant a reasonably safe place to work, and that violation of duty caused libelant's injury."

Again impossible that there could have been any "application" of the modification.

We think that the Honorable Court fell into grievous error in [fol. 61] holding as it did, and citing these three cases as authority for the holding, or, in other words, the Court has decided the case upon an issue not in it.

To put it in another way, the Court has applied to this case a principle of law not at all involved.

It has decided the case as though the charge of negligence was that of furnishing an unsafe place or appliance, whereas the sole negligence charged was neglect of duty on the part of a fellow employee.

The Courts have established without cavil the doctrine that while a master may not delegate the duty to furnish safe equipment and place, he may delegate the duty of performing the work and of superintendence. That is a material distinction. The Court in the opinion says:

"must rely absolutely upon the performance by the master of the duty to warn him of descending loads, that the non-delegability of that duty becomes apparent."

We think the Court must, upon reflection, withdraw that statement. The master not only can lawfully and rightfully delegate that duty, but he must, in the very nature of things, do so. Otherwise large



transactions could never be carried on. Some ships have six hatches. If all six hatches are being worked the master cannot possibly stand over each hatch, nor for all the twenty-four hours of the day—for ships in harbor generally work twenty-four hours—and personally warn the members of the crew of descending loads or other dangers. So the law says that he can delegate that duty but he cannot delegate the duty to furnish safe place. The master could very readily and easily personally inspect the working place and the appliances used. He could do that in a very few minutes, and he could make these inspections as often as is necessary, and therefore the law does not allow him to delegate that duty, but it is imperative in the very [fol. 62] nature of things that he be allowed to delegate the duty to direct the men.

The distinction is so clear in reason and is so well settled by the courts that no mistake should now be made.

Another reason for this distinction is that the employee has no control over equipment, but he does control his own conduct. He has nothing to do with selecting equipment, but he can, if he will, use care for his own safety and protection. Therefore the rule as to delegability in the matter of conduct of employees and of furnishing equipment is different.

The employer absolutely controls the furnishing of the equipment and the place, but he does not and cannot control the conduct of his employees with regard to their own safety. The decision of the Court is applicable to a case where the only allegation of negligence was safe place. It is inapplicable to a case such as this where there was no charge as to safe place.

Stevedores work with a more reckless abandon than any other class of employees. Their familiarity with that kind of work has bred in them a sort of contempt for fear or danger. They work with an over-confidence and thoughtlessness that puts them in a class by themselves. So heedless are some of them that the employer could not compel them to be careful unless he stood over them all the time. This, of course, is not only impractical but impossible, and he may, and does, delegate the duty of directing the men, and, under the federal law, all such subordinates become fellow servants with the men of their gang.

[fol. 63] Since stevedoring is now admitted to have become a necessary part of our commerce, and therefore a proper and necessary work, it seems unreasonable to place the entire burden of the safety of the men upon the employer.

A few weeks ago three verdicts were rendered in one week in one county, in stevedoring cases, the three verdicts aggregating \$39,600. That is more than the net earnings of three stevedoring companies for an entire year.

What is to be done? Some say carry insurance, but because of large verdicts and great losses the rate has become almost prohibitive and it is difficult to find a substantial company to carry it even at the high rate.

The Court will probably answer that such is not its problem, and



we admit it is not for the Court to solve, but it illustrates the importance of the pending question, and why it justifies a hearing to the full bench.

Respectfully submitted, Roberts & Skeel, Amicus Curiae.

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[fols. 64-64-3] IN SUPREME COURT OF WASHINGTON

[Title omitted]

### PETITION FOR REHEARING

Appellant respectfully petitions the court for a hearing en banc of the decision of Department One in the above entitled case (34 Wash. Decisions 116), on the ground that Department One erroneously decided a question of maritime law (which is a Federal question controlled exclusively by the decisions of the Federal Courts) without any reference to the Federal decisions directly in point on the same state of facts, all of which decisions are directly contrary to the conclusion of Department One.

Department One decided that, under the maritime law, a hatch-tender on a boat, who during the loading operation from time to time gives warning signals to the stevedores in the hold as each sling-load comes down, is a vice-principal and not a fellow-servant, and that the master is liable where in a single instance the hatch-tender fails to give warning and a stevedore in the hold is injured as the direct result thereof. Although the boat was a structurally safe place to work in, and the machinery and appliances perfectly safe, and although the master exercised reasonable care in selecting a competent hatch-tender to give the warning signals from time to time as they became necessary, Department One holds that the negligence of the hatch-tender in failing to carry out this "operative [fol. 64-5] detail" in the single instance in question, is that of the master and not that of a fellow-servant.

To this we say that all the Federal decisions in point on the same state of facts—and there are a number of them—are squarely to the contrary; and to those cited in the original brief, then deemed sufficient, we have here added a number of others equally cogent and binding, a reading of which we believe will induce the Court immediately to grant a rehearing.

That the present case is governed by the maritime law is recognized by Department One in this case; and that fact is, of course, well established.

*Chelentis vs. Luckenbach Steamship Company*, 247 U. S. 372;

*Robins Dry Dock & Repair Co.*, U. S. Adv. Aps. 1924-5, p. 192;

*Heino vs. Libby, McNeil & Libby*, 116 Wash. 148, 159-60;

*Roswall vs. Grays Harbor Stevedoring Company*, 32 Wash. [fol. 64-6] Decisions, 235, 238;

*Jackson vs. Mitsui & Company*, 32 Wash. Dec. 322, 325-6,

The maritime law is a distinct body of law consisting of the acts of Congress and the rules of admiralty law as accepted by the Federal Courts.

*Southern Pacific vs. Jensen*, 244 U. S. 205, 215.

In that case the court said:

"Considering our former opinions, it must now be accepted a settled doctrine that, in consequence of these provisions, Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country \* \* \* And further, that, in the absence of some controlling statute, the general maritime law as accepted by the Federal Courts, constitutes part of our national law, applicable to matters within the admiralty and maritime jurisdiction."

This maritime law cannot be changed by the states in its characteristic features, either by legislation or judicial decision.

[fol. 64-7] *Knickerbocker Ice Company vs. Stewart*, 253 U. S. 149, 160;

*State vs. Dawson*, 122 Wash. 572, 579, affirmed 264 U. S. 219.

In *Knickerbocker Ice Company vs. Stewart*, *supra*, the court said:

"As the logical result of these recent opinions and the earlier cases upon which they are based, we accept the following doctrine: The constitution itself adopted and established, as part of the laws of the United States, approved rules of the general maritime law, and enabled Congress to legislate in respect of them and other matters within the admiralty and maritime jurisdiction. Moreover it took from the states all power, by legislation or judicial decision, to contravene the essential purpose of, or to work any injury to characteristic features of such law or to interfere with its proper harmony and uniformity in its international and interstate relations. \* \* \* Since the beginning, Federal Courts have recognized and applied the rules and principles of maritime law as something distinct from the laws of the several states."

The fellow-servant rule is concededly a maritime rule and an integral part of the admiralty law and administered as such by the Federal Courts.

*The Osceola*, 189 U. S. 158;

*Chelentis vs. Luckenbach Steamship Company*, 247 U. S. 372, 380;

*Carlisle Packing Company vs. Sandanger*, 259 U. S. 255, 258;

*Quebec Steamship Company vs. Merchant*, 133 U. S. 375;

*Panama Railway Company vs. Johnson*, 289 Fed. 964, 965;

*Cassil vs. the United States Emergency Fleet Corporation*, 289 Fed. 774;

*The Daisy*, 282 Fed. 261;

*The Frank D. Stout*, 276 Fed. 382;

*Olsen vs. Oregon Coal and Navigation Company*, 104 Fed. 574.

There is, then, in this case only the single question of determining what is the maritime law, as found in the decisions of the Federal Courts, as applied to the facts of the present case.

That a "stevedore" is not a "seaman" within the meaning of the [fol. 64-9] Federal statutes protecting seamen in certain cases against the operation of the fellow-servant rule is conclusively established by Federal decisions construing these Federal statutes.

The Hoquiam, 253 Fed. 627;

Cassil vs. United States Emergency Fleet Corporation, 289 Fed. 774.

The binding force of this construction is recognized by Department One.

The opinion of Department One in this case also recognizes that, under the maritime law, the winchdriver was a fellow servant of the plaintiff; and that fact, of course, is likewise thoroughly established by the Federal decisions.

Cassil vs. United States Emergency Fleet Corporation, 289 Fed. 775;

The Frank D. Stout, 276 Fed. 382;

The Daisy, 282 Fed. 261;

The Hilarus, 163 Fed. 421;

The Elton, 142 Fed. 367;

The Peninsular, 79 Fed. 972;

The Bolivia, 44 Fed. 943;

[fol. 64-10] The Queen, 40 Fed. 694;

The Furnessia, 30 Fed. 878;

The Islands, 28 Fed. 478;

Quince vs. The New Jersey Lighterage Co., 23 Fed. 363;

The Harold, 21 Fed. 428.

That leaves for determination only the question stated by Department One as follows:

"To inquire whether the hatchtender was a fellow-servant of the respondent under the maritime law."

Department One decided this question as a new question, as if there were no decisions on the point, although several federal cases exactly in point were cited in the appellants brief.

We proceed to enumerate the cases.

In the following federal admiralty cases it was held, on the precise state of facts here involved, that the failure of the hatchtender, gangwayman, or signalman in a single instance to give the customary warning to the stevedores in the hold before the next load came [fol. 64-11] down, was the negligence of a fellow-servant in carrying out an operative detail, and that the master was not liable on the theory that he had failed to furnish a safe place to work or safe appliances.

Herman vs. Port Blakely Mill Co., 71 Fed. 853 (D. C. Cal.);

Gulf Transit Co. vs. Grant, 222 Fed. 817 (C. C. A. 5th);

The Hoquiam, 253 Fed. 627 (C. C. A. 9th);

Western Fuel Co. vs. Garcia, 255 Fed. 817, 260 Fed. 839 (C. C. A. 9th);

The Frank D. Stout, 273 Fed. 382 (C. C. A. 9th).

The Cedric, 299 Fed. 815 (D. C. N. Y.);

To the same effect on the same facts are:

Ocean Steamship Co. vs. Cheeney, 86 Ga. 278, 12 S. E. 351;

Portance vs. Coal Co., 101 Wis. 574, 77 N. W. 875.

In the following common-law cases in the federal circuit courts of appeal, on an analogous state of facts, the failure of a co-worker [fol. 64-12] during the course of operation to give the customary warning signal in a single instance, to the damage of another servant, was held to be the negligence of a fellow servant and that the master was not liable on the theory that he had failed to furnish a safe place to work or safe appliances.

Maine & N. H. Granite Corporation vs. Hachey, 173 Fed. 784 (C. C. A. 1st);

Wood vs. Potlatch Lumber Co., 213 Fed. 591 (C. C. A. 9th);

Missouri Valley Bridge Co. vs. Walquist, 243 Fed. 120 (C. C. A. 8th);

McDonald vs. Buckley, 109 Fed. 290 (C. C. A. 5th);

American Bridge Co. vs. Seeds, 144 Fed. 605 (C. C. A. 8th);

To the same effect are:

McLaine vs. Head & Dowst Co., 71 N. H. 294, 52 Atl. 545;

Donovan vs. Ferris, 128 Cal. 48, 60 Pac. 519;

Note 54 L. R. A. at page 120.

[fol. 64-13] In the following common-law cases from the Supreme Court of the United States, on an analogous state of facts, the failure of a co-worker during the course of operation to give the customary warning in a single instance, to the damage of another servant, was held to be the negligence of a fellow-servant, and that the master was not liable on the theory that he had failed to furnish a safe place to work or safe appliances.

Alaska Mining Co. vs. Whelan, 168 U. S. 86;

Randall vs. Baltimore & Ohio R. R. Co., 109 U. S. 478;

Northern Pacific R. Co. vs. Charles, 162 U. S. 359;

Martin vs. Atchison T. & S. F. R. Co., 163 U. S. 399;

Northern Pacific R. Co. vs. Dixon, 194 U. S. 339;

Kreigh vs. Westinghouse Co., 214 U. S. 255.

We preface the quotations from the foregoing cases by stating [fol. 64-14] that, under the maritime law and under the common-law as accepted by the federal courts and the federal courts decide questions concerning master and servant on their own independent judgment of what the general common law is and are not controlled by local interpretations. Baltimore & Ohio R. Co. vs. Baugh, 149 U. S. 368, 373-5), the master has the non-delegable duty of furnishing a safe place to work, safe appliances, and competent fellow-serv-

ants; and in the absence of showing that the master has failed to exercise reasonable care in any of these respects, there can be no liability on the part of the master. The master's duty is one of provision, namely, of a safe place, safe appliances, and competent fellow-servants. The servant's duty is one of operation, namely, to carry out the operative details of the work, in the safe place, with the safe appliances, and in co-operation with the competent fellow servants provided by the master, in a careful and prudent manner, without injuring other fellow-servants. For any breach of the [fol. 64-15] master's duty of provision, the master is liable. But from any injury arising solely from the manner in which otherwise competent fellow-servants carry out the details of the work the master is not liable. And that the master has furnished competent fellow-servants to assist in carrying out the operation is presumed (*Wabash Ry. Co. vs. McDaniels*, 107 U. S. 454). Furthermore, a single act of negligence of a fellow-servant in carrying out or failing to carry out a detail of the operation is no proof that the master did not select a competent fellow-servant (*Southern Pac. Co. vs. Hetzer*, 135 Fed. 272; C. C. A. 8th).

Moreover, the general non-delegable duty of a master to give general instructions and general warning at least once to inexperienced servants or youthful servants when sending them for the first time to work in a place and with appliances which are safe for experienced workmen but which may be dangerous for the inexperienced, must [fol. 64-16] not be confused with the duty of the master with reference to work in the course of which warning signals from one servant to another become necessary from time to time as a detail of the work (*Maine & N. H. Granite Co. vs. Hachey*, 173 Fed. 785; C. C. A. 1st). The master's duty in such a case, according to the unanimous opinion of the federal courts in both admiralty and common-law cases, is to furnish a competent fellow-servant to carry out this operative detail of giving the warning signals from time to time as they become necessary; and, in the absence of proof that the master was negligent in his selection of the servant designated to carry out that detail of the operation, the master is not liable in case of damage from negligence in that regard.

Coming now to the present case, the evidence shows that the master provided a safe place, a safe winch, and a competent fellow-servant to give the warning signal to the stevedores in the hold each time a slingload came down. The only negligence claimed is that the [fol. 64-17] hatchtender failed, in a single instance, to give the customary warning signal before the load came down. That this single act of negligence of the hatchtender is the negligence of a fellow-servant, and not a breach of the master's duty to furnish a safe place to work is the uniform holding of the federal cases, which we now discuss.

## I

The Decisions of the Federal Courts in Admiralty, on the Identical Facts Here Involved, are Uniformly Contrary to the Decision of Department One

In *Hermann vs. The Port Blakely Mill Company*, 71 Fed. 853, it was clearly established that the libelant was injured solely because the man whose duty it was to give the warning signal of another load to the men engaged between decks in stowing the boat failed in the instance in question to give the warning signal. Judge Morrow dismissed the libel on the ground that the negligence in failing [fol. 64-18] to warn was the negligence of a fellow-servant, and not a breach of the master's positive non-delegable duty to furnish a safe place to work. We quote from that decision:

"It is contended by counsel for defendant that the company cannot be held responsible, because libelant was a fellow-servant with the employee, whose duty it was to give the warning signal and that he was not injured through any fault or omission of duty which the company, as employer, owed to its employees. The libelant's counsel argues that this contention is not sound, for the reason that, among the positive duties and obligations which the employer owes to his employees is that of providing a safe place for the employees in which to work; that, applying this rule to the case at bar, it was necessary for the maintenance of that safety to give warning as each piece of lumber was sent down into the hold of the vessel; and that the giving of this warning was one of the duties which the law imposes upon the master personally, which failure to perform shall, whether it be his personal negligence or his servant, acting in his stead, damages may be awarded. \* \* \*

[fol. 64-19] "The rule [requiring the master to furnish a safe place to work] itself is well settled. The question here is whether the negligence of the person on the wharf, whose duty it was to give the warning signal, and who failed to do so was a breach of the master's duty to furnish libelant a reasonably safe place to work in, or whether it was the negligence of the fellow-servant, not engaged in the performance of a positive duty required in the master. It is important to observe in this connection that libelant was not injured by reason of any defect or inherent danger in the premises or place where he was engaged in working, which the master knew or should have known, and which libelant did not know; but he was injured solely by reason of the fact that the person whose duty it was to give the warning signal omitted to do so. No question was raised in the hearing as to the safety of the hold and between decks, so far as the place itself was concerned, nor as to the sufficiency and fitness of the implements and instrumentalities used in loading, nor as to the competency of the person whose duty it was to give the signal to discharge that service. No negligence on the part of the company in employing and selecting the particular individual to give the warning was shown and so far as that feature of the case [fol. 64-20] is concerned, it may be taken as conceded, that he was competent. The legal presumption is that he was competent, and

that the master discharged his duty to the libelant in that respect, no proof to the contrary having been submitted. \* \* \*

"Having selected a competent person, the master has done all that the law requires of him, and any negligence of such employee is the act of a fellow-servant, for which the master is, by the general law, exempt from liability. This view of the case is confirmed by inquiring into the danger which existed and its cause. The only fact that rendered the place unsafe was the failure to give the signal. But for that omission, it would have been, on the particular occasion when libelant was hurt, free from danger. The method of loading lumber pursued in this case, and the practice of giving signals of warning, so that those in the vessel could get out of the way as the piece of timber comes down the chute, is, as was testified, the usual and customary way of loading vessels with lumber on this Coast. The libelant himself testified that, 'if they gave warning for each piece, no accident will happen. We have plenty of time to get away.' It is difficult, therefore, under this state of facts, to see how the negligence of the co-employee can be imputed to the employer, [fol. 64-21] without contravening the general and well-settled rule exempting the employer for the negligence of a fellow-servant. The mere negligence of the servant does not prove negligence of the employer. *Cooper vs. Railroad Co.*, 23 Wis. 669. Had it been shown that the signal-man was addicted to intemperance, or by reason of some physical defect or careless habits, which the employer knew or should have known, was unfit and incompetent to discharge his duties in a reasonably careful and proper manner, such a state of facts would tend to bring the case within the well-recognized exceptions to the general rule. But no such showing was made. The contention of counsel for libelant is that the place where libelant was working was rendered unsafe by reason of the fact that the person on the wharf, whose duty it was to give the warning, failed to do so, and that this negligence constituted a breach of duty on the part of the master to furnish a safe place for libelant to work in. The word 'place,' in my judgment, means the premises where the work is being done, and does not comprehend the negligent acts of fellow-servants, by reason of which the place is rendered unsafe or dangerous. The fact that the negligent act of a fellow-servant renders a place of work unsafe is no sure and safe test of the master's duty and liability in this respect, for it may well be said that any [fol. 64-22] negligence which results in danger to someone makes a particular spot or place dangerous or unsafe and to so hold would virtually be making the master responsible for any negligence of a fellow-servant which renders a place of work unsafe or dangerous. It would be doing the very thing which it is the policy and object of the general rule not to do. It would create a liability which the master could not avoid by the exercise of any degree of foresight or care. In this case the person who was detailed to give the warning signal, and omitted to do so, was undoubtedly, both in reason and authority, a fellow-servant of libelant. They were both engaged in a common employment, viz., that of loading lumber; both were employed and paid by the same common master, the Port Blakely Mill Company."



In *Gulf Transit Company vs. Grant*, 222 Fed. 817, decided by The Circuit Court of Appeals for the Fifth Circuit, it appeared that the injured libelant was a stevedore working in the hold of a ship. In that case the libelant claimed that the gangwayman (hatch-tender) had prematurely given a signal to the winch man to lower [fol. 64-23] the cotton without having first warned the libelant in the hold below. The libelant alleged that the gangwayman "without warning the libelant, carelessly and negligently signalled the winchman aforesaid to lower away on the bales of cotton." The libelant further alleged that the duty to warn the stevedores in the hold was a non-delegable duty of the master. The District Judge entered a decree in favor of the libelant. In reversing the case, the Circuit Court of Appeals for the Fifth Circuit said as follows:

"It is conceded by counsel that the injuries to the appellee resulted from the negligence of the gangwayman in prematurely giving the signal to the winchman to lower the cotton, and the only question to be determined is whether the appellee and gangwayman were fellow-servants, within the rule which exempts the master from liability for the negligence of one servant resulting in injury to another of the same class. They were both employed by appellant, which was, **quoad the ship**, an independent contractor. They were engaged [fol. 54-24] in a common employment in the same department of service, and both received orders from the same employer. The gangwayman had no control over the appellee; his duty being simply to signal the winchman when to hoist the cotton and lower it into the hold of the ship. The winch and other appliances were in good condition and there is no claim that the gangwayman was an incompetent servant. Counsel for appellee insists that it was the duty of the appellant to exercise reasonable care in providing him with a safe place to work, and that the negligence of the gangwayman in giving the signal prematurely to the winchman, rendered the place unsafe, and hence for the resulting injuries to him, the appellant is liable in damages.

"This position of counsel is opposed by the decided weight of authority, and to it we are unable to give our assent. That the appellee and the gangwayman were fellow-servants, and that the appellant was not responsible for the negligent acts of the gangwayman in carrying on the work, clearly appears from the two cases of *New England R. R. Co. vs. Conroy*, 175 U. S. 327, 20 Supreme Court 85, 44 L. Ed. 181; and *Kreigh vs. Westinghouse*, 214 U. S. 249, 29 Supreme Court 619, 53 L. Ed. 984."

[fol. 64-25] The Circuit Court of Appeals then quotes from *Kreigh vs. Westinghouse*, 214 U. S. 249, 256, as follows:

"But while this duty [of furnishing a safe place and safe appliances] is imposed upon the master, and he cannot delegate it to another and escape liability on his part, nevertheless, the master is not held responsible for injuries resulting from the place becoming unsafe through the negligence of the workmen in the manner of carrying on the work, where he, the master, has discharged his primary duty of providing a reasonably safe appliance and place for his employees to carry on the work, nor is he obliged to keep the



place safe at every moment, so far as such safety depends upon the due performance of the work by the servant and his fellow-servant."

In *The Hoquiam*, 253 Fed. 627, decided by the Circuit Court of Appeals for the Ninth Circuit, the injury was occasioned by the direction of the hatchtender to the winchman to swing the load into the hold without first warning the man below. The libel in that case was expressly predicated on the failure of the hatchtender to [fol. 64-26] give warning to the libelant in the hold below. The libel in that case alleged:

"That in order to facilitate the work of stowing the said ties and to make the place of work of said longshoremen safe, it was necessary to the men working in the hold at the time a slingload of ties were lowered into the hold, to have the hatchtender give them warning. That it was customary for the hatchtender to give signals of warning to the men in the hold at the time of lowering the ties, and that the hatchtender did give such warning except as hereafter more fully set out. And that the men in the hold of said vessel relied upon said warning being given.

"The libelant began working and stowing away said ties in said ship 'Hoquiam' on the 11th day of May, 1913, at about the hour of eight o'clock in the forenoon, and continued at said work until the hour of 9:30 o'clock in the forenoon. That he was working upon the starboard side of said ship and a slingload of about twenty-five ties was lowered upon said starboard side of the ship by the said second officer, and that libelant and his partner stowed away all of said ties except one or two, and were in the act of lifting up one of the remaining ties to stow it away when the said second officer [fol. 64-27] of said ship 'Hoquiam,' instead of placing the next slingload of ties upon the port side of said ship, without giving warning to libelant, carelessly and negligently and with utter disregard to libelant's safety, lowered said slingload of about twenty-five ties upon libelant on the starboard side, knocking the libelant down and breaking his left thigh about midway between the knee and the hip, injuring libelant for life."

And Judge Cushman, trying the case below, found:

"That it was customary for the hatchtender to give signals of warning to the men in the hold at the time of lowering the ties into the hold, except when said hatchtender would be in a position to see that everything was clear.

"That the libelant was working abreast the hatch on the starboard side of the ship, in the hold, stowing away ties, when, without warning to him, a slingload of ties was lowered into the libelant's place of work, striking libelant and knocking him down, breaking the femur of his left leg about the middle of the lower third."

Judge Cushman allowed the libelant fifteen hundred dollars (\$1,500.00).

[fol. 64-28] In reversing the case, the Circuit Court of Appeals for the Ninth Circuit said:

"The findings having settled disputed questions of fact, the sole question presented and argued is whether or not the hatchtender, a seaman employed by the ship, and the longshoreman, employed from the land by the hour by the ship in assisting in loading, were fellow-servants."

The Circuit Court of Appeals then holds that the hatchtender and the stevedore were fellow-servants, and that the injured stevedore, not being a "seaman" under the Act of Congress of 1915, was subject to the operation of the fellow-servant rule.

In *Western Fuel Company vs. Garcia*, 255 Fed. 817, 821, the Circuit Court of Appeals for the Ninth Circuit said:

"The Court below found that the death of Sousa was caused by the negligence of the hatchtender in withdrawing the bucket from the hopper before it was fully dumped, and to his negligence in not giving warning to those in the hold where Sousa was working as a [fol. 64-29] stevedore and killed, and further that the deceased was not guilty of contributory negligence. Upon the record we see no sufficient reason to disturb those findings of fact."

On rehearing of the same case, 260 Fed. 839, The Circuit Court of Appeals in changing its original opinion said:

"The error into which we fell grew out of our not treating the deceased Sousa, and the winchdriver and hatchtender, through whose negligence the accident occurred, as fellow-servants. That they were such fellow-servants, for which reason the appellant cannot be held responsible, was decided in a similar case by this Court in the '*Hoquiam*,' 253 Fed. 627, 165 C. C. A. 254. See also the similar decision of this Court in the case of *Olsen vs. The Oregon Coal and Navigation Company*, 104 Fed. 574, 44 C. C. A. 51, and cases there cited."

In *Frank D. Stout*, 276 Fed. 382, decided by the Circuit Court of Appeals for the Ninth Circuit it was said:

"Some of the witnesses for libelant said that the signalman must have been careless in not giving the signal to the winchman, as it [fol. 64-30] was the duty of the signalman to watch and see that the load is not drawn in so as to hurt the man below."

But the Court held that under *Chelentis vs. Luckenbach*, 247 U. S. neither vessel nor owner was liable for the negligence of a fellow-servant.

The latest decision on the point is *The Cedric*, 299 Fed. 815, where a stevedore brought suit for an injury alleged to have been sustained by reason of the fact that the gangwayman (hatchtender) failed to warn the stevedore in the hold that the winchman was sending down a load. Ward, Circuit Judge, in dismissing the libel, said:

"Third. If the gangwayman should have given warning to the libellant below that the draft was coming down, not doing so would be the negligence of the fellow-servant."

A state case exactly in point is *Ocean Steamship Company vs. Cheney*, 86 Georgia 278, 12 Southeastern 351. In that case the sole negligence claimed was that the hatchtender failed to warn the plain-[fol. 64-31] tiff in the hold below that the load was coming down. The Court said:

"The hatchtender was usually the engine driver, or one of the hands employed to assist in loading the vessel. It appears that no special person was designated for this service, but that the hatchtender 'was taken indifferently from the laborers.' He was engaged by the company in the same business that all the other hands of the gang were engaged in, to-wit, the loading of the vessel with freight. He was therefore a co-employee with the other persons engaged in this business; and if, when stationed in the hatchway for the purpose of giving notice to the hands below, he failed to give that notice, or if he absented himself from the hatchway, and, while absent, some other person engaged in the business threw the bale down into the hold without notice to those below, and the plaintiff was thereby injured, it was in consequence of the negligence of a co-employee, and under the law he can not recover for such negligence. We do not think it makes any difference whether the bale was thrown down when the hatchtender was present and failed to give notice, or whether in his absence some other co-employee threw the bale down. In either case it would be the negligence of a co-employee. It would [fol. 64-32] be the negligence of the hatchtender in not giving notice, or in absenting himself from the hatchway, or, in case it was done in the hatchtender's absence, the negligence of some other co-employee in throwing the bale down without notice."

This case was expressly approved by the Circuit Court of Appeals for the Fifth Circuit in *Gulf Transit Company vs. Grant*, 222 Fed. 817.

In the case of *Portance vs. Lehigh Valley Coal Company*, 101 Wis. 574, 77 N. W. 875, the Court said:

"The injury in this case resulted, so far as the evidence goes, from the negligence of the scraperman in starting his machinery without a signal from the rigger with whom the plaintiff was working. If, as plaintiff contends, it also resulted from the omission of the hatchman to give warning, no liability of the defendant results, for the hatchman and the scraperman were clearly fellow-servants with the plaintiff, all engaged in the common undertaking of unloading the coal from the same boat, and under common direction and command with no right of control one over the other." Citing a number of cases.

[fol. 64-33] The foregoing binding decisions of the federal courts in admiralty, and the state decisions illustrating the same principle,

conclusively dispose of the present case, adversely to the decision of Department One; but, inasmuch as the opinion of Department One seems broadly to indicate (34 Wash. Dec. 115, 123), without the citation of any authorities, that it has support in the common-law decisions of the "federal courts in railroad cases," we shall also examine the decision of Department One in the light of the common law, as accepted by the federal courts in analogous cases.

## II

### THE COMMON-LAW DECISIONS OF THE FEDERAL CIRCUIT COURTS OF APPEAL ON ANALOGOUS FACTS ARE UNIFORMLY CONTRARY TO THE DECISIONS OF DEPARTMENT ONE.

In *Maine and New Hampshire Granite Corporation vs. Hachey*, 173 Fed. 785, decided by the Circuit Court of Appeals for the First Circuit, the facts there were similar to those in the present case. [fol. 64-34] Plaintiff was employed by the defendant in its stone quarry and engaged in breaking waste rock, working beside a large pile, on which the rocks were dropped from time to time by a derrick. The derrick was in charge of a boss-derrickman, whose duty it was, under instructions from the defendant, to operate the same, and also to give warning to the plaintiff and other workmen whenever rocks were about to be deposited on the pile. On one occasion he neglected to give such warning, and a rock slid down the pile and injured the plaintiff. In holding that the giving of such warning signals was part of the work of operation, in which the boss-derrickman acted as a fellow-servant of the plaintiff, and not as a representative of the master in the performance of a non-delegable duty to provide a safe place to work, the Circuit Court of Appeals said:

"The granite corporation, plaintiff in error, conceding the negligence of Bassanti, the boss-derrickman, contends that his failure [fol. 64-35] to give warning of the movement of the derrick and of the dropping of stone was a negligent performance of the duties of a fellow-servant of Hachey. The defendant in error contends that under the circumstances the master, in order to make the place at the side of the rock pile a reasonably safe working place, was bound to give warning, and that the person employed to give warning was performing part of the master's non-delegable duty.

"In support of the contentions that in respect to the duty of giving warning of the dropping of stone, the boss-derrickman was not a fellow-servant, but a representative of the master, the defendant in error, suggests a distinction between failure to observe a rule necessary in maintaining a safe place and the failure to observe a rule promulgated for the successful operation of the work. It is argued that the giving of a warning signal was not the work of operation, and that it was distinct from the duty of handling the rock. Such a division of the duties of the boss-derrickman into two parts—that is, the operation of the derrick and moving of rock wherein he would be a fellow-servant, and that of giving warning wherein he

would not be a fellow-servant—is not sound. Those cases which, in general terms, state it to be a master's duty to give warning to in-[fol. 64-36] experienced servants or of special danger, are not applicable to the facts of the present case, though they may furnish some general phrases which aim to give support to the argument of the defendant in error. The general proposition that it is the duty of the master to give warning is not to be so extended as to require him to give in person or to insure the giving by others of all those special signals or shouts which are so associated with the work of operation as to become a part of it. The employment of different men in different parts of the general work requires under many circumstances the giving of signals as an accompaniment of the work itself; in order that there may be co-operation in the movement of the men. The giving of such signals is a part of the work of operation. Such signals are rather the giving of information showing what one workman is about to do in order that his fellow workmen may have knowledge of it and conduct themselves accordingly, than the giving of orders which are to be considered as the orders of a master. *Standard Oil Company vs. Anderson*, 212 U. S. 216-226, 29 Supreme Court 252, 54 L. Ed. 480. The master may entrust to a competent servant the work of shouting or otherwise signaling when he is about to lower away and it is not the master's fault if such a servant fails to inform his fellow-servants of the movement of the machine under his charge.

[fol. 64-37] "The evidence does not show any failure of the master to make reasonable provision that proper signals should be given. The uninterrupted custom of the work of the quarry shows that there was no defect in the system established by the master. The authorities do not support the contention that the master is an insurer of the sufficiency of the means that he selects for giving signals. There can be little doubt that the boss-derrickman who controls the movements of the derrick by signalling the engineer is a suitable, if not the most suitable, person to entrust with the duty of giving warning of the proposed movements of the derrick. But the course of business with which Hachey, by many years of experience had become familiar, the duties of operating the derrick and of giving notice of its operations, were related and associated duties entrusted to a fellow workman. Reasonable provision for giving warning having been made, the danger that this workman might be negligent in a single instance in the performance of his duty was a risk assumed by Hachey \* \* \*"

"The authorities cited by the plaintiff in error amply sustain its contention that the negligence of Bassanti was of a fellow-servant and not the negligence of the master." Citing a number of cases [fol. 64-38] from the Supreme Court of the United States and other jurisdictions.

This decision cites with approval *Hermann vs. Port Blakely Mill Co.*, supra, 71 Fed. 853.

The case of *Hermann vs. Port Blakely Mill Co.*, *supra*, is further approved in *Wood vs. Potlatch Lumber Company*, 213 Fed. 591, decided by the Circuit Court of Appeals for the Ninth Circuit. In that case the plaintiff was injured by being struck by a timber negligently thrown from a sawmill refuse conveyor without warning having been first given to persons below, including the plaintiff. Judge Rudkin below denied the plaintiff any recovery, holding that the plaintiff and the person who was charged with the duty of warning, but had failed to warn in this particular instance, were fellow servants. In affirming this judgment, the Circuit Court of Appeals said:

"But the contention most vigorously pressed by the plaintiff is that the case is not one for the application of the fellow-servant [fol. 64-39] doctrine. It is urged in that behalf that the accident was due to the failure on the part of the master to provide a reasonably safe place to work. It is not suggested that the premises were defective or unsafe immediately before or immediately after the accident, or that there was any danger other than from the falling timbers, and it is, of course, conceded that the timbers fell, not by accident, but as the result only of Fennell's willful act. Fennell's intelligence and general competency are not called into question and the defendant had no reason to anticipate that he would take such a reckless course. The timbers could be carried back in the same manner in which they were brought or for that matter they could have been thrown to the ground in the very place where the accident occurred. If, under such circumstances, the negligence of the servant is chargeable to the master, the cases would be rare where the latter could escape liability. It is futile for the plaintiff to argue that he makes no complaint of the manner in which the timbers were thrown down but only that they were thrown at all. The throwing of the timber down did not of itself constitute negligence. Such a method involved no inherent or unavoidable danger. If someone had stood below to give warning, no one could have been harmed, so that primarily the negligence consisted, not in the selection [fol. 64-40] of the place where the timbers were discharged, but in the manner of their discharge. If this be negligence of the master, then in every case where, in the erection of a building, one workman willfully or carelessly lets fall on a fellow workman a tool or piece of material, the employer could be held liable. Suppose that Fennell had carelessly let a hammer drop while installing the new wheel and it had fallen upon and injured the plaintiff working below, or Nelson had carelessly cast aside a brick and it had struck the plaintiff, precisely the same principle would apply."

In *Missouri Valley Bridge & Wire Company vs. Walquist*, 243 Fed. 120, decided by the Circuit Court of Appeals of the Eighth Circuit, it appeared that the plaintiff's intestate was killed by being struck by a timber which was being swung in place in constructing an ice breaker. The testimony showed that in swinging the timbers in place it was customary to

give a warning signal to the men engaged on the work, and that the particular timber that killed the deceased was swung into place with unusual force and rapidity, and that no notice or warning of [fol. 64-41] its approach was given to the deceased. The plaintiff had a judgment below. In reversing the judgment, the Circuit Court of Appeals held that the negligence was not the negligence of the master but that of the fellow-servant. It said:

"It is the duty of the employer to exercise reasonable care to provide safe place and appliances; but it is the duty of the employees to exercise reasonable care so as to use the place and appliances furnished so that their use shall inflict no injury upon them. The duty of the employer is one of original construction and provision. The duty of the employee is one of operation. The employee assumes the ordinary risks and dangers of his employment and among these the risks and dangers of the negligence of his fellow-servants in the performance of the work, including the risk and danger of the negligence of his superior, be he foreman or superintendent, who in his direction or failure to direct the operation of the work is his fellow-servant. [Citing many Federal cases.] \* \* \*

"All the other acts or omissions of which there is any testimony and of which the plaintiff complains, such as the failure to raise the [fol. 64-42] timber to a sufficient height, the failure to give Walquist warning of its approach, and the failure to station a person near him to inform him of its movements, were acts or omissions in the operation of the work for which the foreman or other fellow-servants of Mr. Walquist were responsible, and the bridge company was not. The conclusion is that there was no substantial evidence in this case of any causal negligence of the bridge company, and the Court should have instructed the jury to return a verdict in its favor."

In *McDonald vs. Buckley*, 109 Fed. 290, decided by the Circuit Court of Appeals for the Fifth Circuit, it was held that a general foreman employed by contractors, and having charge of the work of putting in the foundations for a wharf, while engaged in the actual work of directing the operations of a pile driver, giving signals to the engineer for the fall of the hammer, is a fellow-servant with the other members of the pile driver gang, and that his giving the signal to drop the hammer of the pile driver, without having first warned [fol. 64-43] the plaintiff in that particular instance, was the negligence of a fellow-servant, for which the master was not responsible. In reversing the judgment in favor of the plaintiff and holding that the trial Court should have directed a verdict for the defendant, the Circuit Court of Appeals said:

"There was no evidence tending to show that the master did not furnish safe and proper machinery and appliances, nor that the master did not use due and proper care in the selection of competent employees." \* \* \*

"Considering and applying the rules laid down by the Supreme Court in the cases above mentioned, we are constrained to hold in



the instant case, that, although Griffiths was the foreman, and had charge and direction of the operations of the pile driver and of all the employees in the pile driver gang, with the power to employ and discharge, yet, while engaged in actual work of operating the pile driver, giving the signals to the engineer for the fall of the hammer, he was a fellow-servant with the other members of the gang, and that any negligence committed by him while thus working was his own personal negligence for which the masters are not responsible."

[fol. 64-44] In *American Bridge Company vs. Seeds*, 144 Fed. 605, decided by the Circuit Court of Appeals for the Eighth Circuit, the plaintiff was injured because the foreman of the gang gave the signal to raise a block and tackle without having first warned the plaintiff. In reversing the judgment in favor of the plaintiff and holding the negligence to be that of a fellow-servant, the Circuit Court of Appeals said:

"It is the duty of the master to use ordinary care to furnish reasonably safe machinery and instrumentalities with which his servants may perform their work, and a reasonably safe place in which they may render their service, and this duty may not be so delegated by him that he may escape liability for its breach. Nevertheless, this duty has its legal limits. It does not extend to the guarding of and safety of a place, or of a machine against its negligent use by the servants. The risk that a safe place will become unsafe, or that safe machinery will become dangerous by the negligence of the servants who use them, is one of the ordinary risks of the employment by the servants necessarily assumed when they accept it. It [fol. 64-45] is a risk of operation and not of construction or provision, and the duty to protect place and machinery from dangers arising from negligence in their use is the duty of the servants who use them, and not of the master who furnishes them."

In *Union Pacific Railway Company vs. Marone*, 246 Fed. 916, decided by the Circuit Court of Appeals for the Eighth Circuit, the Court said:

"The duty of the master is one of provision. The duty of the servant is one of operation, and neither is liable for the negligence of the other. It is the duty of the master to exercise reasonable care to provide a reasonably safe place in which to work, and reasonably safe machinery and appliances with which his servants may do the work assigned to them, and for causal negligence in the discharge of this duty, the master is liable and the servants are not. It is the duty of the servants to exercise reasonable care so to use the place, machinery, and appliances furnished, and to conduct the operations entrusted to them, as to protect themselves from risk, danger, and injury, and for a breach of this duty the servants are liable and the master is not. Where the place in which the servant is required to [fol. 64-46] work or the machinery or appliances with which he is required to work, or a method of doing the work, is made or becomes dangerous and results in injury only because of the negligence of the injured employee, or because of the negligence of his fellow-



servants, or because of the concurring negligence of both, the master is not liable, for such negligence is a breach of the duty of operation and not a breach of the duty of provision."

In *Smith vs. Lehigh Valley R. R. Company*, 141 Fed. 193, it was held that the mate "gave a signal to the captain of the tug, which was done, without notice, as was customary, having been given to the libelant that the tug was to be started." The failure to give the usual warning was held to be the negligence of a fellow-servant and that the master could not be held liable in the absence of showing negligence on his part in the selection of the servant.

We refer to a few state cases to the same effect.

[fol. 64-47] In *McLaine vs. Head & Dowst Company*, 71 N. H. 294, 52 Atl. 545, it was held that the failure to give a warning signal as a mere detail of operation resulting in injury was the negligence of a fellow-servant, the Court said:

"If ordinary care requires that a warning of danger arising from the work should from time to time be given to his servants as the work progresses, it is the master's duty to provide for such warning. Having made provision for the warning by intrusting the duty to a competent person, he is not liable for the negligence of the person intrusted with the duty. *Hasséy vs. Conger*, 112 N. Y. 614, 20 N. E. 556, 3 L. R. A. 559, 8 Am. St. Rep. 787; *Steamship Co. vs. Cheeney*, 86 Ga. 278, 12 S. E. 351; *Id.* 92 Ga. 726, 19 S. E. 33, 44 Am. St. Rep. 113; *Luebke vs. Railway Co.*, 59 Wis. 117, 17 N. W. 870, 48 Am. Rep. 483; *Id.* 63 Wis. 91, 23 N. W. 136, 53 Am. Rep. 266; *Portance vs. Coal Co.*, 101 Wis. 574, 579, 77 N. W. 875, 70 Am. St. Rep. 932; *Donovan vs. Ferris*, 128 Cal. 48, 60 Pac. 519, 79 Am. St. Rep. 25; *Hartwig vs. Lumber Co.*, 19 Ore. 522, 25 Pac. 358; *The Harold (D. C.)* 21 Fed. 428; *Hermann vs. Mill Co. (D. C.)* 71 Fed. 853; *The Pioneer (D. C.)* 78 Fed. 606; *Martin vs. Railroad Co.*, 166 U. S. 399, 403, 17 Sup. Ct. 603, 41 L. Ed. 1051. For other [fol. 64-48] cases to the same effect, see *Tedford vs. Electric Co. (Cal.)* 66 Pac. 76, 54 L. R. A. 120, note "f," where it is said that 'all authorities with the exception of the single New Jersey case (*Stone Co. vs. Mooney*, 61 N. J. Law 253, 39 Atl. 764, 39 L. R. A. 834), seems to be agreed that a master is not liable for the negligence of a servant in failing to notify a co-employee of the approach of a transitory peril, which, as the work progresses, will render the environment unsafe for a brief period, but which may easily be avoided if due warning is given.'"

In *Donovan vs. Ferris*, 128 Cal. 48, 60 Pac. 519, the plaintiff was injured by a blast because the foreman failed in that instance to notify him with the usual warning that a blast was about to be fired. It was held "that the foreman was a fellow-servant and that in the absence of proof that the master had selected an incompetent servant or that the tunnel was an unsafe place to work, the defendant was not liable, and that a non-suit was properly granted."

The Common-law Decisions of the Supreme Court of the United States on Analogous Facts are Uniformly Contrary to the Decision of Department One.

In *Alaska Mining Co. vs. Whelan*, 168 U. S. 86, the plaintiff was injured because the foreman caused a rock chute to be opened without giving the usual warning to the plaintiff. Plaintiff testified that it was the foreman's custom to warn the men whenever he was ready to open the chute, but that in this particular instance the foreman gave no warning, with the result that the plaintiff was seriously injured. In the court below the plaintiff had a verdict and judgment, which was affirmed by the Circuit Court of Appeals for the Ninth Circuit. In reversing both courts, the Supreme Court held that causing the chute to be opened without giving the usual warning signal was the negligence of a fellow-servant, and that the defendant's motion for a directed verdict should have been granted. The [fol. 64-50] court said:

"He was none the less a fellow-servant with them, employed in the same department of business, and under a common head. There was no evidence that he was an unsuitable person for his place, or that the machinery was defective for its purpose. The negligence, if any, was his own negligence in using the machinery or in giving orders to the men."

In *Randall vs. The Baltimore & Ohio R. R.* 109 U. S. 478, it was held that a brakeman working a switch for a train could not maintain an action against the railroad for the negligence of an engineer of another train of the same company, "in not giving due notice of its approach." The failure to give warning was held to be the negligence of a fellow-servant in the performance of a common service.

In *Northern Pacific Ry. vs. Charless*, 162 U. S. 359, it was held that the negligent failure of employees on a train to give a signal of its approach, whereby a track laborer was injured, is the negligence [fol. 64-51] of fellow-servants for which the master is not liable. In reversing a judgment for the plaintiff, the court said (363):

"We think it was error to submit to the jury the question of the negligence of the employees on the extra freight train in failing to give signals of its approach. The failure, assuming that it constitutes negligence, was nothing more than the negligence of co-servants of the plaintiff below in performing the duty devolving upon them. We hold the company was not liable for the negligence of the hands on the freight train in failing to give proper signals."

In *Martin vs. The Atchison, Topeka & Sante Fe R. R.*, 166 U. S. 399, it was held that the failure of the section foreman to warn the plaintiff of an approaching train was the negligence of a fellow-servant. The court said (page 403):

"The counsel for the plaintiff has argued before us that the defendant must be held responsible because the plaintiff had been directed by the foreman, under whose order he was placed, to look north while he was in the car, and had received the foreman's assurance that he, (the foreman) would warn him of the approach of [fol. 64-52] danger, and that as the foreman failed to do so, it was the failure of the defendant to do something which it was bound as a master to do in furtherance of the obligation it was under to see that the plaintiff had a reasonably safe place in which to perform his work. We do not perceive that the doctrine as to the duty of the master to furnish a safe place for the servant to work in has the slightest application to the facts of this case. There is no intimation in the evidence nor is any claim made that the hand-car upon which the plaintiff was riding was not properly equipped and in good repair and every way fit for the purpose for which it was used. It was a perfectly safe and proper means of transit in and of itself from the station at Albuquerque to the point where the plaintiff was going to work. The negligence of the section foreman in failing to note the approaching train and to give the proper warning, so that the car might be taken from the track was not the negligence of the defendant in regard to the performance of any duty which as master it owed the plaintiff. If the car were rendered unsafe, it was not by reason of any lack of diligence on the part of the defendant in providing a proper car, but the danger arose simply because a fellow-servant of the plaintiff failed to discharge his own duty in watching for the approach of a train from the south.

[fol. 64-53] "Upon an examination of the cases above cited it will be found that the principles therein laid down clearly and plainly cover this case."

In *Northern Pacific Railroad Company vs. Dickson*, 194 U. S. 339, a local telegraph operator, who was asleep, did not report the arrival of a train nor warn the operative of another train of its approach. In the resultant collision, the plaintiff intestate, a fireman, was killed. In holding that the company was not liable because the negligence of the telegraph operator in failing to give warning of the approaching train was the negligence of a fellow-servant, the court said (page 346):

"It is urged that 'it is as much the duty of the company to give correct orders for the running of its trains so they would not collide as it was to see that their servants had reasonably safe tools and machinery with which to work, and a reasonably safe place in which to work,' and hence, that one who is employed in securing the correct orders for the movements of trains, is doing personal work of the employer, and not to be rated as a fellow-servant of those engaged [fol. 64-54] in operating and running the trains. But the master does not guarantee the safety of place or machinery. His obligation is only to use reasonable care and diligence to secure such safety. Here the company had adopted reasonable rules for the operation of all its trains. No imputation is made of a warrant of competency

in either the train dispatcher or the telegraph operator. So far as appears, they were competent and appropriate persons for the work in which they were employed. A momentary act of negligence is charged against the telegraph operator. No reasonable amount of care or supervision which the master had taken before-hand would have guarded such unexpected or temporary act of negligence. Before an employer should be held responsible in damages it should appear that in some way, by the exercise of reasonable care and prudence, he could have avoided the injury. He cannot be personally present everywhere and at all times and in the nature of things, cannot guard against every temporary act of negligence by one of his employees."

All of the foregoing cases were cited with approval in *Texas & Pacific Railroad Company vs. Baurman*, 212 U. S. 536. [fol. 64-55] In *Kreigh vs. Westinghouse & Company*, 214 U. S. 249, there were two charges of negligence, one of provision, in that the master failed to rig its derrick "with two ropes, one attached on either side of the end of the boom, to be used to haul it back and forth, and for the purpose of steadying its operation," or with a lever attached "to the mast in such a way that a man operating the lever could control the swinging of the boom" (214 U. S. 249, 254), the other a negligence of operation, in that the man operating the boom swung a bucket attached to the boom outward against the plaintiff, a fellow-workman, without giving him the usual warning signal (214 U. S. 249, 255). The Supreme Court held that the employer was not liable for the failure to give a warning signal in the course of operation because it was the negligence of fellow-servants, but that there was evidence of "experts that the proper construction of such a derrick required that its booms should be rigged with two [fol. 64-56] guy ropes instead of one or that the mast should be provided with a lever, the means of which the man in control could safely control the boom"; that there was, therefore, a question for the jury whether the injurious effect of the derrick "was not attributable to faults of construction and equipment as well as to negligent operation at the time of the injury." The court held that, while the employer was not liable for the negligence of the fellow-servants in pushing the bucket against the plaintiff without warning, it might be liable for negligence in the construction and equipment of the derrick if that negligence duly contributed to the cause of the injury. See analysis of foregoing case in *Union Pac. R. Co. vs. Marone*, 246 Fed. 916, 920 (C. C. A. 8th).

[fol. 64-57] Department Decision Overrules *Heino vs. Libbey, McNeil & Libbey*, 116 Wash. 148

The controlling force of the maritime law in maritime cases prosecuted in the state courts was definitely and unqualifiedly recognized by this court in *Heino vs. Libbey, McNeil & Libbey*, 116 Wash., 148, decided less than four years ago (June 21, 1921). In that case maritime employees brought suit at common law to re-

cover wages claimed to have been earned in a maritime venture. The defense was made that these employees were guilty of desertion and, under the maritime law, forfeited the wages. The trial court refused to apply the maritime law and instructed the jury at variance with it. A recovery having been had, an appeal was taken to this court where the case was reversed and dismissed. The question was directly presented whether the case being brought in a common law court was to be controlled by maritime or common law [fol. 64-58] principles. The case was presented to one of the departments and subsequently assigned for hearing en banc. Upon full and mature deliberation, the court en banc held that although having been brought as a common law action in a state court, the case must be governed by the acknowledged rules of admiralty, adopting as a controlling precedent, among others, the decision of the United States Supreme Court in *Knickerbocker Ice Company vs. Stuart*, 253 U. S. 149. This court, on mature deliberation, then held that such cases by force of the constitution, itself, are to be decided according to the rules of admiralty, and that it is beyond the power of any State, either by legislation or by judicial decision to vary the maritime law as developed by the federal courts. Hence, in the *Heino* case, when this court found that according to the federal admiralty decisions there could be no recovery it looked no further but adopted those decisions as absolutely binding and dismissed the case. The opinion in the *Heino* case on re-hearing [fol. 64-59] was written by his Honor Judge Holcomb and was concurred in by Judges Parker, Mackintosh, Bridges, Main, Mitchell and Tolman. The *Heino* decision was followed subsequently in *Roswall vs. Grays Harbor Stevedoring Company*, decided January 8, 1925, *Washington Decisions* Volume 32, Number 5, page 235, and *Jackson vs. Mitsui*, decided January 9, 1925, *Washington Decisions*, Volume 32, Number 5, page 322. The decision of *Knickerbocker Ice Company vs. Stuart*, which forms the basis of the decision of this court in the *Heino* case, has since been repeatedly affirmed and re-affirmed by the Supreme Court of the United States. Now we are confronted with this decision of Department Number One, which, it must be manifest, is utterly inconsistent with the *Heino* decision, and in effect overrules it. The action of Judges Parker, Bridges, Main and Tolman in concurring in the *Heino* case cannot be reconciled with their action in rendering this decision. In the *Heino* case this court accepting and following the rulings of [fol. 64-60] the Supreme Court of the United States, holding that the Constitution itself, in establishing the general maritime law took from the states all power by legislation or judicial decision, to contravene its principles. This means, if it means anything, that the state courts are bound to accept all of the maritime law, statutory and non-statutory, as it has been established by Congress and by the Federal Judiciary. The decisions upon which the *Heino* case were based lend no support to the suggestion that it is competent for a state court to accept such portions of the admiralty law as it pleases to and reject the balance. Nor is there any foundation whatever for the claim that a state court, while bound to accept

that smaller portion of the admiralty law which has been reduced to statutory form is, nevertheless, free at will to reject the greater portion of that law which is non-statutory. Upon reflection, it must be evident that the state courts, if bound to accept the admiralty law [fol. 64-61] at all, must accept it in its entirety, otherwise there can be no uniformity. Like the common law, the maritime law is a body of principles that have been evolved and established through both legislative and judicial action. By far the greater portion of that system of law is non-statutory. When, therefore, in this case Department Number One, by its opinion, has held that while bound to accept a decision of the Circuit Court of Appeals of the Ninth Circuit, construing a statute dealing with a question of maritime law, it is not bound to follow the decisions of that court dealing with general principles of maritime law; it must be admitted that the decision so made is directly in conflict with the *Heino* case in which this court unreservedly admitted its obligation to accept all the maritime law as established by federal authority.

Department One, in its opinion, admits that the case presents an important question of federal law, and cites the *Imbrovek* decision to the point that it is a question of federal law. Then, in [fol. 64-62] disposing of this admittedly federal question, the court does not cite a single federal case bearing on the question as to what is the maritime law relative to the question of fellow servant. The department contents itself with citing several paragraphs from *Ruling Case Law*, which are in the main historical only, and do not purport to discuss the precise question presented. It may be true, as suggested in the department opinion, that the fellow servant rule was adopted by the admiralty courts from the common law, but this entirely overlooks the point is that it is for the federal courts, and the federal courts alone, to say to what extent common law principles shall be imported into the admiralty law, and the extent to which any exceptions or modifications of any common law principles shall be recognized.

In the department opinion it is said "no case has been brought to our attention in which the admiralty courts have refused to recognize it (vice-principal doctrine)." We are at a loss to understand [fol. 64-63] how the department could have made this statement, except through inadvertence. We think it must be admitted that a given employee at a given instant, with respect to a given transaction cannot be both a vice principal and a fellow servant. When, therefore, under a given state of facts, a federal court in admiralty has declared that such an employee is a fellow servant, that declaration is actually a holding that such employee is not a vice-principal. In the original briefs we cited three cases from the Circuit Court of Appeals of this circuit, holding that a hatch tender is a fellow servant and not a vice principal. These cases are the *Hoquiam*, 253 Fed. 627 (cited opening brief page 48); *Western Fuel Company vs. Garcia*, 260 Fed. 839 (cited opening brief page 49), and *Kongosan Maru*, 292 Fed. 801 (cited reply brief page 8). None of these cases are noticed at all in the department opinion except



the Hoquiam and that was only cited to a different point. In addition to the three cases cited in the original brief we have now cited in this petition for a re-hearing, a multitude of cases, showing conclusively what the federal law is on this subject. The last federal case on this subject is Robbins Dry Dock and Repair Company vs. Dahl, which will be found in the Advance Opinions of the United States Supreme Court, issue of February 2, 1925, page 192. In that case the United States Supreme Court again announced the principle that the admiralty law must be the same everywhere. It cannot be one thing in New York harbor and another thing in San Francisco or Seattle. In that case it was held that a statute of New York could not be given any effect because to do so would work a modification of an acknowledged maritime principle. Under that decision, the legislature of the State of Washington could not pass a statute which would be effective to establish a fellow servant rule at variance with the decisions of the Circuit Court of Appeals of the Ninth Circuit. How, then, can it be possible that this court can modify the general maritime law by a decision and accomplish a result which the legislature itself could not produce by statute, especially when this court, itself in the Heino case, has already acknowledged that it is beyond the power of any state by either legislation or judicial decision to contravene the established principles of general maritime law. It is futile to say that the maritime law can be uniform if each state court has the power to import into it common law doctrines according to its own notions. It will not be claimed that the Supreme Court of the State of Washington has any greater power in this respect than the Supreme Court of any other seaboard state. As a matter of fact, among the cases cited in this petition, are some from California showing that the holdings of that state are directly contrary to this decision on the precise question involved. If the maritime law, as administered in the State of Washington, is to be modified by a vice-principal doctrine according to the notions of the Supreme Court of the State of Washington, and the maritime law in the State of California is to be modified by a fellow servant doctrine according to the notions of the Supreme Court of the State of California, it is, of course, futile to say that the general maritime law will be the same and operate uniformly in the ports of San Francisco and Seattle.

[fol. 64-67] The Federal Decisions Apparently Relied on by Department One are Clearly not in Point

Department One in the present case remarked that the vice-principal rule appeared to have been adopted by the admiralty courts in certain cases, now to be referred to. None of these cases are in point on the question here involved.

In *Alaska Pacific Company vs. Egan*, 202 Fed. 867, the master was held liable for having furnished an unsafe appliance.

In *Pacific American Fishery Co. vs. Hoof*, 291 Fed. 303, the master was held liable for having provided an unsafe ladder.

In *The Kinghorn*, 297 Fed. 621, the master was held liable for having furnished unsafe machinery (an improper lead from the draft to the winch drum).

[fol. 64-68] The Egan case and the Hoof case are Ninth Circuit cases and if they really hold what this court assumes they do hold, they would be in direct conflict with the decisions of the same court in the cases of *The Hoquiam*; *Western Fuel Company vs. Garcia and Kongosan Maru*. The two groups of cases, however, are not at all in conflict. The one group holds a ship owner liable when an injury has occurred through the fault of the ship owner in furnishing unsafe or improper apparatus. The other group of cases holds the ship owner or the stevedoring company not liable when the fault only is that of the workman in using apparatus that is not unsafe in itself. The distinction is very plain, and the case at bar falls squarely within the latter classification. In fact the statement of facts as made in the opinion of Department One makes it quite clear that in this case there was no negligence whatever in furnishing unsafe or improper appliances.

[fol. 64-69]

#### Conclusion

Nothing need be added to the foregoing statement of the federal law. The cases speak for themselves. They show that Department One was in error in the result reached on the federal question involved, whether the holding be viewed in the light of the binding admiralty decisions of the federal courts directly in point or in the light of the general common law of master and servant as accepted by the federal courts in analogous cases.

In our examination of the federal authorities we have not found a single case that supports the conclusion of Department One. We respectfully submit that the conclusion reached by Department One is erroneous, that a hearing en banc should be granted, the departmental decision overruled, and directions given to dismiss this action.

Respectfully submitted, Stephen V. Carey, Roy E. Bigham,  
Attorneys for Appellant.

[fol. 65]

#### IN SUPREME COURT OF WASHINGTON

[Title omitted]

MOTION FOR STAY OF EXECUTION AND ENFORCEMENT OF JUDGMENT—Filed Sept. 18, 1925.

Comes now the appellant in the above entitled action and moves the above entitled Court, or any Judge thereof, for an order staying the execution and enforcement of the judgment in the above entitled action for a reasonable time to enable the appellant to apply for and obtain a writ of certiorari from the Supreme Court of the United



States; such order to supersede the order heretofore entered by this Court on July 30, 1925, directing the Clerk to withhold the remittitur.

This motion is based upon Rule 35 (6) of the Rules of the Supreme Court of the United States (effective July 1, 1925), and upon Section 8 (d) of the Act of Congress of February 13, 1925, relating to stay of execution pending application to the Supreme Court of the United States for a writ of certiorari, and upon the files and proceedings herein.

Stephen V. Carey, Roy E. Bigham, Attorneys for Appellant.

[File endorsement omitted.]

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[fol. 63] IN SUPREME COURT OF WASHINGTON

[Title omitted]

ORDER STAYING EXECUTION AND ENFORCEMENT OF JUDGMENT—  
Filed Sept. 18, 1925

The above entitled matter came on to be heard on motion of the appellant for an order staying the execution and enforcement of the judgment in the above entitled action for a reasonable time to enable the appellant to apply for and to obtain a writ of certiorari from the Supreme Court of the United States in this cause, and judgment having been entered on September 17, 1925, and the Court having considered the rules and statutes applicable to said motion, and having heard the arguments of counsel, and being duly advised in the premises, and considering that said motion should be in all respects granted, now therefore,

It is ordered, adjudged, and decreed, That the execution and enforcement of the judgment in the above entitled action be and the same hereby is stayed for a period of 60 days from the date hereof, upon appellant's filing a good and sufficient bond in the sum of Five Hundred Dollars, approved by the undersigned, and conditioned that if the appellant fails to make such application for such writ within the period allotted therefor, or fails to obtain an order granting its application, or fails to make its plea good in the Supreme Court of the United States, appellant shall answer for all damages and costs which the respondent may sustain by reason of the stay herein [fol. 67] granted; this order superseding the order heretofore made on the 30th day of July, 1925, directing the Clerk of this Court to withhold the remittitur in the above entitled action.

Done in open Court this 17th day of September, 1925.

O. R. Holcomb, Acting Chief Justice, Judge.

O. K. as to form. Mark M. Litchman, Atty. for Respondent.

[File endorsement omitted.]

[fols. 68-71] SUPERSEDEAS BOND OF APPEAL FOR \$500.00—Approved; omitted in printing

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[fol. 72] IN SUPERIOR COURT OF KING COUNTY

[Title omitted]

**Statement of Facts**—Filed Sept. 3, 1924

CAPTION

Be it remembered, That heretofore, and on, to-wit, May 1st, 1924, at the hour of 2:30 o'clock P. M. of said day, the above entitled cause came regularly on for trial in said court and pursuant to assignment in Department No. 6 thereof, before Honorable Calvin S. Hall, one of the Judges of said Court, with a jury.

APPEARANCES OF COUNSEL

Mr. Thomas R. Horner, Mr. Mark M. Litchman, Attorneys for Plaintiff.

Mr. Roy E. Bigham, Mr. Stephen V. Carey, Attorneys for Defendants.

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[fol. 73]

ARGUMENT OF COUNSEL

A jury was thereupon first duly empaneled and sworn to try said cause.

Thereupon, Plaintiff by his counsel made the following opening statement *of* the jury, to-wit:

Mr. Litchman: If it please the Court, and ladies and gentlemen of the jury: In this case, it is our intention to prove to you the following state of facts: On May 21st, 1923, nearly a year ago, the plaintiff R. Haverty, was employed by the International Stevedoring Company at work in the hold of a ship, stowing away some bales of wool being loaded into the hold of the vessel through No. 8 Hatch. A ship is provided with hatches. They began to work at 8 o'clock; and about a half an hour or an hour after that, after they commenced loading, and at about 9 o'clock this injury that Mr. Haverty received took place. It is our intention to prove that one Lee Carle was the hatch tender; it was his duty to tend hatch as such hatch tender; and it was his duty to superintend the loading of the bales of wool, and the lowering of the bales of wool after they were taken from the dock and down through the hatch and down into the hold; and he was supposed to give signals to the winch driver, not only to lift loads, of wool weighing approximately sixteen hundred pounds, from the dock, but to also give signals to the winch driver to lower the loads down into the hold. It was also a custom, I understand, at

the time that while the men were engaged in stowing away the loads and while they were in the hold of the ship, that no loads, or no [fol. 74] other loads, should be lowered. Furthermore, that there is a custom which we intend to prove, that while men are engaged in the opening of the hatch, that is to say, while they are engaged in working, and in such position that anything coming down there can hit them, that no loads should be lowered; and furthermore, we intend to prove that each time a load is being lowered into the hold of the ship, the hatchtender has to give a signal to the men below, or sound a warning to them, to look out below, or stand clear, or some such signal. These men depend upon this warning; or, rather, the plaintiff, I should say, along with the other men working with him, depended upon these signals, and also upon this warning. On the day in question, and at the time in question, a load of wool was lowered, weighing approximately sixteen hundred pounds, into the hold of this ship; and I expect to prove that Mr. Haverty, the plaintiff in this case, was then working with another man named McGinn in the open hatchway, stowing away a previous load and did not expect another load to come down; that this load came down, and that no warning was given to him until this load came down and hit him, and of course he was hurt. He was not looking to have the load lowered. As a result, he was hit in the back, and we intend to prove that he sustained the following injuries: That his spine was injured, and the muscles ligaments and tendons of the back were bruised and sprained accompanied by a large swelling over the [fol. 75] lumbar region; that he suffered and sustained a great deal of intra-muscular and subcutaneous hemorrhages, causing a large area of discoloration; and that he suffered a severe nervous shock; that he was taken to the hospital where he remained for something like three weeks, and he then went home, and that for a period of eight and a half months he was unable to follow his trade as longshoreman during that time, and that he had to wear bandages, and that he still has to wear a bandage; and although he is, at the present time, able to work, it is infrequent, and he whenever he stoops down, he suffers considerable pain. We also intend to prove that at the time of the injury he was in extremely good health, and was a young man 23 years old and weighing 171 pounds; that he now weighs 160, and has never been able to regain that same weight; and we are asking for \$6,790. damages.

The Court: Do you wish to make a statement at this time?

Mr. Carey: We will reserve our statement.

The Court: All right. Call your first witness.

R. HAVERTY, the plaintiff herein, was called as a witness in his own behalf and, being first duly sworn, testified as follow:

Direct examination.

By Mr. Litchman:

Q. Mr. Haverty, you are the plaintiff in this case?

A. Yes.

Q. How old are you?

A. I am 24 years old.

[fol. 76] Q. 24 years old?

A. Yes.

Q. Where do you live?

A. At 325 Summit.

Q. 325?

A. Summit Avenue.

Q. How long have you lived in Seattle?

A. Fourteen years in Seattle this summer.

Q. You have been here fourteen years this summer?

A. Yes.

Q. What is your business?

A. Stevedoring; longshoring.

Q. That is the business of loading and unloading ships?

A. Yes.

Q. How long have you been in that business?

A. Four years.

Q. Where were you, Mr. Haverty, on or about the 21st day of May, 1923?

A. I was in the hold of the Andrea Luckenbach.

Q. You were working for the International Stevedoring Company, were you then?

A. Yes, sir.

Q. When were you employed by them?

A. When was I employed?

Q. Yes. Were you on the 21st day of May, 1923, working for the International Stevedoring Company?

A. Yes, I was.

Q. The defendant in this case?

A. Yes.

Q. Now, where were you working for them?

[fol. 77] A. I was working at—well, at the time I was hurt, it was Pier A; but it is Pier 40 now.

Q. Were you working as a longshoreman or stevedore?

A. Stevedoring.

Q. Were you working there on a boat?

A. Yes.

Q. What boat?

A. The Andrea Luckenbach.

Q. What kind of a boat is that?

A. It is a steamboat; steamer.

Q. What size?

A. I could not say.

Q. Well, it is a big ocean-going steamer, of 14,000 tons gross; is it not?

A. Somewhere around there.

Q. Now, whereabouts were you working in the boat?

A. In the after hatch, No. 8 hatch.

Q. What deck were you working on?

A. I was working in the lower hold.

Q. Now, what is a hold?

A. Well, the hold is where they store these different kinds of freight on a boat.

Q. Is that the bottom of the boat?

A. Well, yes—yes, that happened to be at that time.

Q. Where you were working was the bottom of the boat?

A. Where I was working at that time, yes.

Q. Then what is above that? How many decks were there on that boat?

A. Well, on this ship there was three decks above that.

Q. Three decks, including the top?

[fol. 78] A. Yes.

Q. Including the hold and the top deck, there were four decks; is that correct?

A. Yes; four decks.

Q. First, there is the hold, and then the second deck, and then the third deck; and then the top deck?

A. Yes.

Q. And you were working down in the hold of the vessel?

A. Yes.

Q. Now, what were you doing; what was the nature of your work?

A. I was stowing wool.

Q. Well, how was that wool handled? What were you doing with it?

A. We were stowing the wool.

Q. What is that actual work. What did you do with the wool?

A. Well, we were putting the wool away.

Q. The wool was being lowered into the hold and you were taking it away and stowing it away in the boat?

A. Yes.

Q. Now, how did that wool come in there? In what kind of shape is it, when it is dropped into the hold to be stowed away?

A. It is about three feet high, and about a foot square, I think.

Q. Do you mean to say it is about a yard square, a block?

A. No.

Q. What is the size of each bundle of wool that came down there?

A. Well, they are about three feet high.

— Now, how is the wool done up?

A. What is that?

Q. How is the wool done up; what kind of a package does it come [fol. 79] in when it was being lowered down there into the vessel to you. Was it baled up like hay?

A. Well, yes, just about the same way; it had been—it had big heavy straps on the outside of it.

Q. Is it compressed?

A. Some of it you cannot put your hook in, once in a while.

Q. Was it heavy?

A. Yes.

Q. Heavy bale?

A. Yes.

Q. How much does each bale weigh?

A. I should think it would weigh between four and five hundred pounds.

Q. How many bales on that day were being lowered into the hold in each sling load?

A. There were four bales in each sling load.

Q. And that would make a load weighing about sixteen hundred to two thousand pounds?

A. Yes.

Q. Now, who were working with you there in the hold of the vessel on that day?

A. Mr. McGinn.

Q. Were there any other longshoremen in that hold?

A. Yes.

Q. Who else was there?

A. There was Mr. McGinn, Mr. Hagey and I on that side.

Q. Mr. McGinn, Mr. Hagey and you were on one side of the ship?

A. Yes.

Q. Who were on the other side?

A. Mr. Mowat, Mr. Oliver and Mr. Cameron.

[fol. 80] Q. Mr. Mowat; and what is the other name?

A. Mr. Oliver.

Q. And who else?

A. Mr. Cameron.

Q. Making about six or seven men, all told, down there?

A. Yes.

Q. In what end of the vessel were you?

A. In the aft end of the vessel.

Q. The aft end?

A. Yes.

Q. That is the end back where the propellers are?

A. Yes.

Q. What is the other end called?

A. The forward end.

Q. And the side of the vessel towards the port side or up against the dock is called what?

A. The inshore side.

Q. Well, it is called the port side, is it not?

A. The inshore side.

Q. And what is the other side called?

A. The off-shore side.

Q. What side of the vessel were you on?

A. I was on the off-shore side.

Q. And you were with Mr. McGinn?

A. Yes.

Q. And who was on the inshore side of the vessel?

A. These other fellows.

Q. These other boys were on the inshore side?

A. Yes.

Q. Now, how far apart were you men? That is, you say you and [fol. 81] McGinn were on the off-shore side doing your work there; how far was it from where Mowat and Oliver and Cameron were?

A. Mr. McGinn and I were right midships; that is, right in the square of the hatch; and Mr. Hagey was about six feet from us.

Q. And these other boys; about how many feet away were they?

A. Well, they were——

Q. Well, you were all down there together; is that what you mean?

A. Yes.

Q. Now, how did this wool get down there to you through the hatch? How was it handled?

A. Well, it is this way: They put four of them bales in a sling and then they hook onto them and hoist them in with a steam winch.

Q. Well, then, what is done with it?

A. Well, when he comes in with a load, he holds it until we all get hold of it, and then we swing it to where we want it to be.

Q. Now, that is done by means of this big steam crane, these big booms with couplings on each end, and then he hooks on to a big basket called a sling, they put their stuff in there, and then they pull that up with the engine and swing it around and lower it down into the hatch?

A. Yes.

Q. Now, who was the hatch tender at that time?

A. Mr. Lee Carl.

Q. Who is the hatchtender of the vessel? What is a hatch tender?

A. Well, he looks after the hatches.

Q. He is the boss of the hatches?

[fol. 82] Mr. Carey: Now, just a minute. I object to that as being the testimony of counsel, and not the testimony of the witness; and also contrary to the facts.

Mr. Litchman: Well, it is a rule——

The Court: I will sustain the objection.

Mr. Litchman: If there is any dispute about what a hatch-tender is. Of course, I don't think there is any dispute.

Mr. Carey: Well, that is your contention.

Mr. Litchman: That the hatch tender is just what the name implies.

Mr. Carey: I think so.

Mr. Litchman: He is the man who tends the hatch.

The Court: You may proceed with the examination. I will sustain the objection.

Q. What does the hatch tender do around a vessel?

A. Well, the first thing he does, he sees that the load is hooked on and that everything is all right, and then when it is hooked on, he gives a signal to the winch driver, and he takes it right in there——no, he takes it up the side of the ship, and from there, the hatch tender looks down in the hold, and sees everything is all right, and then he signs out, "Look out", or something, and then he gives a signal to come in with the load.



Q. Now, that word "sing out" is a longshoreing term; state what it means?

A. Well, it means—well, they holler out "look out below", and and then you know a load is coming in.

Q. When you say he sings out he hollers that out to the men down below to look out if there is a load coming?

[fol. 83] A. Yes.

Q. Now, who was the hatch tender on the boat that day?

A. Mr. Lee Carles.

Q. And who was the winch driver, if you know?

A. Mr. Harry Deerhol.

Q. Now, Mr. Haverty, just state to the jury what happened to you?

A. Well, Mr. McGinn and I were working right in the square of the hatch, and I was stooping over, and he was, too, we were just about to tip one of these tales over and stow it; and just as we were going to tip it over, a load came in, without either one of us expect-it, and I was the one that got it; I got hit; I got hit and sent right to the hospital, and Mr. McGinn was not hit, but he was almost hit.

Q. Now, where were you hit?

A. I was hit right on the spine, in the small of the back.

Q. Was there any warning given you of the approach or the lowering of this load of wool?

A. There was not.

Q. Did the hatch tender sing out?

A. No, nobody sung out.

Q. Were you given any warning at all?

A. No warning at all.

Q. Did you know that the load was coming?

A. We were not expecting anything, no, sir.

Q. Now, why weren't you expecting anything?

A. Because our other load had not been stowed yet.

Q. You had not yet taken care of the former load?

A. No, sir; there was two loads in the hold then.

Q. Do I understand you had not taken care of the former load?

[fol. 84] A. No, sir, we had not.

Q. When this load that hit you dropped?

A. No, sir, we had not taken it away; we had not stowed that load yet.

Q. Now, did you have any warning or signal at all of its approach?

A. We did not have any.

Q. Now, what position were you in when you were hit?

A. In a stooping position.

Q. How is that?

A. In a stooping position.

Q. What were you doing? What was the actual work you were doing with the wool?

A. We had hold of it, and we were going to stow it; I believe we were up-ending it, or something.

Q. Now, just show the jury, as near as you can, turn towards the

stenographer, and just show the jury about what position you were in when you were hit?

A. I was about like that? (Demonstrating).

Q. And you were lifting, to lift the wool over?

A. Yes.

Q. Whereabouts in the back did it hit you?

A. It hit me right there (indicating).

Q. In the small of the back?

A. Yes.

Q. That is all; take your seat again. Now, what happened to you when it hit you?

A. Well, I was—what happened to me, did you say?

Q. Yes; what was the result of being hit?

A. I was just hoisted up and sent to the hospital.

[fol. 85] Q. Were you conscious at the time, or do you remember? Did you lose your head, or were you out of your mind?

A. No, I was not; but I was stunned.

Q. Then what did they do with you. What was done with you? Just follow yourself right on now from the time you were hit?

A. Well, after I was hit, they put me on this sling, and sent me up onto the dock, and we waited there until the ambulance came.

Q. Then where did they take you?

A. To the hospital.

Q. How long were you in the hospital?

A. A little over three weeks.

Q. What hospital were you in?

A. In the Sisters of Mercy Hospital.

Q. In the Providence Hospital?

A. Yes.

Q. Then after you were there, what was the exact period you were there, do you remember? You say you were there three weeks?

A. I was there just a little over three weeks.

Q. Well, these papers, I believe you have the papers here; the bills?

A. Mr. Litchman has them.

Q. All right, I will get the exact figures. Then where did you go?

A. After I left the hospital?

Q. Yes?

A. I went home.

Q. You went home? What was your condition?

[fol. 86] A. Well, I could not do any work of any kind.

Q. How long were you unable to do any work?

A. I was unable to do any work for over eight months.

Q. What was the exact period? You say over eight months; how much over? Let us get the exact date to the very day, if you can?

A. Well, eight months and a half.

Q. Now, what were you earning at the time you were hurt?

A. I was earning between \$170 and \$180 a month.

Q. Now, just state how you were earning that; how much were you paid an hour.

A. I was paid eighty cents an hour.

Q. What was the average number of hours? Were you paid any overtime, and if so how much?

A. I was paid a dollar twenty overtime. A dollar twenty an hour.

Q. Now, you were paid eighty cents for the first eight hours?

A. No; eighty cents up until; eighty cents an hour for the eight hours; and the overtime started at six o'clock.

Q. You were paid eighty cents an hour for the eight hours of the day?

A. Yes.

Q. That would be during the day time?

A. Yes.

Q. Then if you did not work in the day time; in the early morning, or at night, what did you get an hour?

A. How do you mean? I don't understand?

Q. Well, let me get that clear. Eighty cents an hour is for day time work?

A. Yes.

[fol. 87] Q. What is day time?

A. From eight o'clock until six.

Q. From eight to six then is day time work?

A. Yes.

Q. And you get eighty cents an hour for that?

A. Yes.

Q. Now what is the other kind of work? What is overtime work?

A. Well, overtime starts at six.

Q. And any work done after six, you get a dollar and twenty cents an hour?

A. Yes.

Q. Is that correct?

A. Yes.

Q. Overtime work don't necessarily mean that you work over eight hours, or any number of hours; but it just means work at other periods than between eight o'clock in the morning and six o'clock in the evening?

A. Yes; if I started at six I get overtime.

Q. And if you worked only two hours, you would get two dollars and forty cents?

A. Yes.

Q. And if before eight o'clock in the morning, you worked an hour, you would get a dollar and twenty cents?

A. Yes.

Q. Now, at that time, you were earning, you say, between \$170 and \$180 a month for your work?

A. Yes.

Q. Now, how much work, how many hours of work would that require?

A. Oh, well, we did not work any certain number of hours; sometimes we might go to work and just work eight hours, or just two [fol. 88] hours; and then again we might work sixteen hours.

Q. I want you to explain that to the jury; your work is not regular?

A. No, sir.

Q. You don't always have just so many hours work a day?

A. No.

Q. Does it come in bunches, your work?

A. Yes. Sometimes we start on a ship and work at that work until it is finished; until the ship is finished.

Q. You mean finish loading the ship?

A. Yes.

Q. And you lost eight and a half months?

A. Yes.

Q. Now, is that the figures exactly, you say, between \$170 and \$180 a month?

A. Yes.

Q. What would be the figures, as near as you can estimate it, what would you earn in that time?

A. Well, you see, some months, you might make \$200, and some months, you might make \$150 to \$160; and it would average up about \$175 I guess.

Q. \$175, then; and for eight and a half months?

A. Yes.

Q. Now, what were your expenses at the hospital, Mr. Haverty, that you were obliged to pay?

A. I couldn't say just what they were.

Q. Do you know what you owe them?

A. I do not.

Q. You allege in your complaint and bill of particulars that your hospital, ambulance, X-ray, and doctors and all was \$260; is that [fol. 89] correct?

A. I believe that is correct.

Q. And you are obligated to pay that?

A. Yes.

Q. Now, state what your suffering was. Oh, yes, another question: Now, did you buy a belt?

A. I did.

Q. What did that cost you?

A. That cost me \$6.

Q. Do you still use it?

A. Yes.

Q. Now, what is that belt for?

A. Well, it is a kind of a support for the spine.

Q. Are you wearing it now?

A. Yes.

Q. Where does it go? Around your body?

A. Right around there (indicating).

Q. Why do you wear it?

A. Well, I could not very well work without it.

Q. Did you wear it before you were hurt?

A. No, sir.

Q. What was your state of health before you were hurt?

A. I was in good health.

Q. What has it been since?

A. Well, I can't say that I am in poor health. Before I was hurt, I weighed 171 pounds; and when I came out of the hospital, I weighed 160, which I still weigh.

Q. Do you feel any pain at the present time?

A. Well, right now, I don't; but when I am at work and I have an extra heavy lift, or when I am in quite narrow quarters where [fol. 90] there is no head room, and it is continuous stooping, I feel it then.

Q. What is the nature of these pains; where do they strike you?

A. Right in the small of the back.

Q. Before you were hurt, you did not have to wear a bandage?

A. No.

Q. Before you were hurt, did you have any pain in that region?

A. No.

Q. Now, do you have any other effect, Mr. Haverty, at the present time, from your being hit?

A. No, not that I know of.

Q. Does it affect you,—do you have any pain except when you stoop over?

A. Well, after I came out of the hospital, I could not—for a long time, I could not sleep.

Q. Now, to what extent, if any, did you suffer by reason of the injury?

A. Well, for four months after I was hurt, I could not stoop at all, you might say.

Q. Why?

A. Why? On account of my injuries.

Q. When you did suffer, what would be your feeling?

A. I don't understand.

Q. I say, when you did stoop over, did it hurt you?

A. Yes.

Q. In your bill of particulars, verified, in which the total is \$260, you have stated here \$57 for the hospital; is that correct?

A. I believe that is correct.

Q. And \$8 for the belt?

[fol. 91] A. \$6 it should be.

Q. Is that correct?

A. That is correct.

Q. And \$8 for the ambulance?

A. Well, I couldn't say about that.

Q. And \$10 for the X-ray, and the physician's bill is \$179?

A. That is correct.

Q. I will ask you, are you a well man to-day? Are you well and healthy?

A. Well, yes, I am.

Q. How is that?

A. I am; I couldn't say I was unhealthy.

Q. Are you in as sound condition as you were before you were hurt?

A. I am not.

Q. You are still wearing the belt, are you?

A. Yes.

Q. And you have these pains when you stoop over?

A. Yes.

Q. Now, you spoke in your testimony of "the square of the hatch." What do you mean by that?

A. Well, that means right down in the hatch, you know, where the—well—

Q. What is the hatch?

A. The hatch is where they take freight in there.

Q. Well, it is a big square hole running down through the boat, is it not?

A. Yes.

Q. And open on each side?

A. Yes.

[fol. 92] A. Yes.

Q. And if it was all closed up, it would be like a big square chimney?

A. Yes; it would.

Q. And it is open on all sides, on all decks?

A. Yes.

Q. Now, how big is it? About fifteen or twenty feet square?

A. Well, this happened to be a small hatch I was in; and all hatches are not the same size.

Q. How high is it? How far was it from where you were up to the top of the deck; or the top of the hatch on deck?

A. I couldn't say for sure; it seemed to me about fifty feet.

Q. That would be about the same as a 4-story building?

A. Yes.

Mr. Carey: What is that?

Mr. Horner: It is about the same as a 3- or 4-story building; four decks, counting the top deck.

Mr. Carey: I never compared it with a story of a building.

Mr. Horner: Well, I was never in my life in a boat; I don't know very much about them either.

Q. But there would be three decks above you?

A. Yes.

Q. And this hatch extended clear down through to the bottom of the boat?

A. Yes.

Q. And you were in the bottom of the boat, down where it comes in clear down to the bottom?

A. Yes.

Q. And it would be about forty feet up to where the winch was?

A. Yes.

[fol. 93] Q. Where was the winch located?

A. On the deck.

Q. In loading and unloading vessels, is it a custom for the hatch-tenders to warn the men down in the hold of the coming and going of loads?

Mr. Carey: Just a minute. I object to that, first, on the ground that it is leading; second, on the ground there is no custom pleaded in this amended complaint, as far as I can recall.

Mr. Horner: We say it is customary, and common safety demands it.

The Court: What paragraph is that in?

Mr. Carey: My recollection is it is not in the complaint at all.

Mr. Horner: It is down on the second page in the third paragraph, where it is alleged

"Which said injuries resulted directly and proximately from the carelessness and negligence of the hatch tender in failing to give signals of the lowering of said load of wool; that it was usual and customary, and ordinary safety and prudence demanded, not to lower a load until a previous load had been cared for and piled away; that the said hatch tender negligently failed to ascertain, as was his duty, whether plaintiff and those working with him had piled away the previous load, and that the load which struck and injured plaintiff was lowered before he had completed the stowing and handling of the previous load."

[fol. 94] The Court: What was the question?

(Question read by the Reporter: Lines 3, 4, and 5, p. 22).

The Court: The part you read from paragraph 3 don't apply to that. You say "It is customary not to lower a load until a previous load had been taken care of".

Mr. Horner: I think it is there in that paragraph as to the duty of the hatch tender.

The Court: Yes; all that you read was the duty of the hatch tender, but not the custom. You may proceed.

Q. What was the duty of the hatch tender?

A. Well,—

Mr. Carey: Just a minute; I think he has already stated that, unless counsel thinks he has failed to state it sufficiently.

Mr. Horner: I believe I did have him state it, but I do not think he stated it clearly. Did you answer that question?

A. Yes.

Mr. Carey: He did.

Mr. Horner: If I have already asked it, I will withdraw it.

Mr. Carey: You asked him, after the load was hooked on, what his duty was.

Mr. Horner: Well, that is all, then; that is all, Mr. Haverty.

Cross-examination.

By Mr. Carey:

Q. How old are you?

A. I am 24 years old.



Q. At that time, you were 23, at the time you were injured?

[fol. 95] A. Yes.

Q. You had been working at stevedoring for four years prior to that time, or four years prior to this time?

A. Well, it would be about four years to date.

Q. So you have been working as a stevedore about four years; or three years, rather, before you were hurt?

A. Yes; about that.

Q. Was that three years spent altogether on the waterfront in Seattle here?

A. It was.

Q. Had you been working regularly as a stevedore during that three years?

A. Well, no; I can't say that. You see, for about one year and a half I worked for the Pacific Steamship Company; and one day you might be in the hold, and the next day in the dock.

Q. So you were working on the dock and in the hold?

A. Yes.

Q. And practically during the entire three years before you were injured, you were working loading and unloading ships either in the ship or on the dock?

A. Yes.

Q. When you were working in the ship during that three years you were working in the hold altogether, were you?

A. No, not altogether.

Q. You never worked as winch driver?

A. No, sir.

Q. Nor as hatch tender?

A. No, sir.

Q. You were one of a crew of men who handled the loads?

[fol. 96] A. Yes.

Q. Loaded and unloaded in and out of the ship by the winch driver?

A. Yes.

Q. You said this accident happened on May 21, 1923, at Pier A; about what hour of the day was it?

A. Well, we started to work at 8, and it seemed like the accident happened about three-quarters of an hour, about three-quarters of an hour afterwards?

Q. You started to work that morning?

A. Yes.

Q. At 8 o'clock, and it was somewhere along about 9 o'clock?

A. Yes.

Q. That the accident happened. How long had you been working on this particular ship at the time you were injured?

A. Well, that was the fourth day on it.

Q. Do you recall how many hatches there were on this ship?

A. Eight.

Q. And this hatch was No. 8 hatch?

A. Yes.

Q. It was the one away aft, or at the extreme rear of the ship?

A. Yes.

Q. How was the ship lying as to Pier A; was it headed in towards shore; or out into the stream?

A. I believe she was headed in; I couldn't say for sure.

Q. Headed in. Which side of Pier A was she on?

A. She was on the south side.

Q. On the south side?

A. Yes.

Q. So that the bow of the boat would be headed in towards Railroad avenue?

[fol. 97] A. Yes.

Q. Inshore?

A. Yes.

Q. And the aft end of the boat would be headed out towards the middle of the bay?

A. Yes; I think that is the way she was headed; I am not sure.

Q. And the left hand side of the boat, the port side, would be next to the dock; is that correct?

A. Yes.

Q. And then the starboard or right hand-side of the boat would be out towards the middle of the channel?

A. Yes.

Q. Now, the material you were loading into this particular hatch, when you were injured, were these bales of wool?

A. Yes.

Q. I think you said they were put up in bales about three feet high, and a foot in diameter, were they, or a foot square; or what would you say about that?

A. Well, they were about three feet; no, they weren't a foot square.

Q. Were they round bales, or square bales?

A. No, they weren't square; they were—well, they were about three feet high and about that thick. (Indicating).

Q. What would be the other dimension?

A. Well, about a foot, I would say.

Q. So they were about three feet high, and about two feet wide, and a foot thick?

A. I think that would be about right.

Q. When did you go to work on Hatch 8? Had you been at work there the day before?

[fol. 98] A. We just started there that morning.

Q. So you had been working on Hatch No. 8 about an hour before you were hurt?

A. Yes.

Q. During that hour, had you been loading wool all the time?

A. Well, no, it took us about fifteen minutes to get rigged up.

Q. Now, explain to the jury what you mean by "rigged up"? You mean by that that the running apparatus was getting put into shape to work?

A. Yes; and taking off the hatches.

Q. Taking off the hatches, means, taking the covers off the hatches?

A. Yes; it does.

Q. And that took about fifteen minutes; and then you went to work loading?

A. Yes.

Q. I think you said, either in your evidence, or in your complaint, that with each sling-load, you handled about four bales at a time, is that correct?

A. Yes, that is correct.

Q. About how many bales had you put down altogether before you were hit? About how many sling-loads had gone down?

A. Oh, about fifteen, I guess.

Q. About fifteen loads?

A. Yes.

Q. Which would make about sixty bales; is that correct?

A. That is about correct.

Q. Now, what had you been loading into this ship before you started to load the wool?

A. Well, the day before, we were taking on shingles.

[fol. 99] Q. Taking on shingles?

A. Shingles and lumber.

Q. And that lumber did not go down into No. 8 hatch?

A. No, sir, that was in a different hatch?

Q. Was there any lumber loaded in No. 8 hatch at all?

A. No, sir.

Q. What was there in No. 8 hatch at the time you started loading wool?

A. There wasn't anything.

Q. It was complete- empty?

A. Yes.

Q. So as the time you started these bales of wool down from the top deck, they went away down to the bottom of the ship?

A. Yes.

Q. And you say that was about forty feet, to the best of your recollection?

A. Yes; something like forty or fifty feet; I am not sure.

Q. Well, I recognize, of course, that you did not take any measurements; but I am just asking you for your estimates. It is considerably higher than the height of this room, is it not?

A. Oh, yes, sure.

Q. Now, in loading these bales of wool, they had a boom, didn't they, that swung out over the side of the ship and out over the edge over the dock?

A. Yes.

Q. And by means of a wire rope and this boom, this wool was hoisted up from the dock and over the side of the ship and then swung in over the middle of the hatch?

A. Yes.

[fol. 100] Q. And then it was let down into the hatch, and un-

loaded, and then hauled back up to the deck and swung out again over the side of the ship for another load; is that the way it went?

A. Yes.

Q. Now, what was the size of the hatch; and by that I refer to Hatch No. 8 where you were working? As near as you can remember?

A. I could not say.

Q. Would you say it was about 24 feet in one direction by about 21 feet in the other direction?

A. No, sir; it would be smaller than that.

Q. You think it was smaller than that?

A. Yes.

Q. I do not suppose you ever measured it, of course?

A. No, sir.

Q. Which was the broad or the long way of the hatch? Was it in the direction of the length of the ship, or was it across the beam or the width of the ship?

A. I don't understand.

Q. These hatches are not exactly square, are they?

A. No, sir.

Q. No; they are about the shape of this bag (indicating a brief case lying on counsel's table)?

A. Yes.

Q. Now, my question was, suppose that the shape of the hatch down there on that ship was the shape of this bag; was the long dimension of the hatch in the direction of the length of the ship, or was it across the ship?

A. It was like that (indicating).

[fol. 101] Q. It was cross ways with the ship?

A. Yes.

Q. Now, let that bag as I have placed it on the table represent the hatch, and that in this direction, in the direction of Mr. Horner, is the bow of the ship pointing inshore, and the dock would then be here?

A. Yes.

Q. Now, what is there around this hatch?

A. Over the hatch, do you mean?

Q. No; around it?

A. Well, the hatch stands about this high in a rim.

Q. Well, that is what is called the hatch combing?

A. Yes.

Q. And that sticks up and forms a sort of a rim around the opening of the hatch; and that sticks up a couple of feet above the deck or floor of the ship; is that correct?

A. Yes.

Q. And forms a rim around the hatch?

A. A kind of a fence.

Q. Yes; now, what is it that you call this part of the ship off to the side; the rail?

A. Do you mean against the side of the ship?

Q. Yes?

A. Yes; that is the rail.

Q. Now, what distance was it from the edge of the hatch to the side of the ship which was in the direction of the dock, over to the rail next to the dock?

A. It seems to me like it was between ten and fifteen feet.

Q. Don't you think it was more than that?

A. No, I don't think so.

[fol. 102] Q. Don't you think that the distance from the edge of the hatch over to the rail was almost as far as the distance across the hatch itself?

A. No.

Q. You don't think so?

A. No.

Q. Now, will you state how high this combing was around the hatch?

A. About two or three feet.

Q. Two or three feet high?

A. Yes.

Q. Anyway, it is much higher than the hatch?

A. Yes.

Q. It probably would come up to a man's knee, or thereabouts?

A. Yes; a little higher.

Q. So that a man standing at the edge of the hatch and right near the hatch combing can look down into the ship?

A. Yes.

Q. And he could see right down to where you were working; that is correct?

A. Yes.

Q. But a man standing over by the rail, of course, could not look into the hatch, could he?

A. No.

Q. He is too far away to do that?

A. Yes.

Q. Now, I think you have already explained,—let this bag represent the hatch, where were the winches with which these booms were operated?

A. Well, they were to the forward end of the hatch.

Q. They were situated right beside the hatch?

[fol. 103] A. Yes.

Q. In the direction of the front end or the forward part of the ship?

A. Yes.

Q. How many of them were there?

A. Well, there was one winch.

Q. I mean on this one hatch?

A. There was one.

Q. Didn't they have double winches on that hatch?

A. Yes, there were two; but they were operated by one man.

Q. But there was actually two winches?

A. Yes.

Q. Two winches to operate on this hatch, and the winch driver stood between them?

A. Yes.

Q. At the edge of the hatch, and he operated one winch or the other, depending upon whether he wanted to pull a load in or pull an empty sling in; is that correct?

A. Yes.

Q. That is, a wire rope that operates the sling is attached to these winches, so that if steam is applied on one winch, it will sling the load in over the side of the ship and lower it into the hatch; is that the way it does?

A. Yes.

Q. And if they want a reverse motion, do they do it with the other winch, or do you know how they do it?

A. Well, yes, when it is reversed it takes out the sling or load.

Q. At any rate, the winch driver that day was Deerholt?

A. Deerholt.

[fol. 104] Q. He was the winch driver and he was standing in between these two hoists, hoisting machines?

A. Yes.

Q. Right near the edge of the hatch combing, and on the side of the hatch which was forward of the ship; is that correct?

A. Yes.

Q. Now, how many men is there in one of these stevedoring crews?

A. There was six hold men.

Q. There are six men in the hold?

A. Yes.

Q. How many men on the deck?

A. There are two men on the deck, and two on the dock.

Q. Now, the men on the dock take care of the slings, don't they?

A. Yes; they put the slings on the loads which are going into the hold.

Q. Now, this sling you speak of is a network of rope, is it?

A. This was a rope sling, yes.

Q. One of those is laid down on the dock, it is laid flat, and the load is piled on it?

A. Yes.

Q. The loads are piled onto that sling by whom? Who put the loads into the slings?

A. The house men do that.

Q. That is, men that are working in the warehouse truck the freight out and put it in the sling?

A. Yes.

Q. Then these two stevedores on the dock they pull the sling up around the load and put the hooks to it?

A. Yes.

Q. At the time they are doing that, what are your men on the deck doing?

[fol. 105] A. Well, I could not say where the hatch tender was.

Q. No; I mean the way they usually do the work?

A. Where were they, did you say?

Q. No; the way they usually do the work, you say there are two men on the deck?

A. Yes.

Q. One of them is the winch driver, and the other is the hatch tender?

A. Yes.

Q. Now, while the men are working down on the dock, getting the sling ready, the hatch tender is standing right at the side of the rail, is he not?

A. Yes.

Q. And the winch driver is there at the winch, right at the side of the hatch?

A. Yes.

Q. And you said that the winchdriver on the Andrea Luchenbach was standing at a point which is just about half way across the hatch?

A. Yes.

Q. In other words, the winches are placed in such a position that the winchdriver is standing right opposite the middle of the hatch?

A. Yes.

Q. And you said that the entire hatch was about twenty feet across, didn't you?

A. Well, I couldn't say about that.

Q. What would you say about it? What did you say about it?

A. I believe I said that I didn't know how far it was.

[fol. 106] Mr. Horner: We haven't the measurement of it; and if you have, we will take your figures.

Mr. Carey: We had the hatch measured, but I do not know what the measurements are now. (Examining papers.) The man that measured it will testify that the hatch is 24 feet abeam, and a couple of inches over; and 21 feet and a couple of inches over this way; so that 24 by 21 is practically the size of the hatch according to our figures.

Mr. Horner: We will accept those figures as the measurement of the hatch.

Q. Then if the hatch is 24 feet wide abeam, and the winch driver is standing in this position here which is just in the middle that would make it about twelve feet from where he is standing over to the hatch combing nearest the dock?

A. Yes.

Q. If the hatch tender is then standing over at the rail he is where he can see what is going on on the dock?

A. Yes.

Q. What did you say your best judgment was as to the distance from this combing over to the rail; about fifteen feet was it?

A. Yes, over to the combing.

Q. So that the hatch tender then when he is standing over here



is about twelve feet plus fifteen feet.—about twenty-seven feet from the winch driver?

A. The hatch tender is?

Q. Yes, if the hatch tender is standing over here at the rail?

A. Yes.

Q. Now, you said that the first duty of the hatch tender is to [fol. 107] give—to see that the hook is properly attached to the load down on the dock; is that correct?

A. Yes.

Q. When that hook is properly attached, then he stands at the rail of the ship and gives a signal to the winchdriver to hoist away, don't he?

A. Yes.

Q. Now, the winchman, on account of his position in the middle of the ship, he cannot see what is going on down on the dock can he?

A. No.

Q. But the winchman can see what is going on down in the hold of the ship; he can look over the side of the hatch and see what is going on down in the hold?

A. Yes.

Q. But he cannot see over onto the dock?

A. No, sir.

Q. Then when the winchman operates his winch,—have you got a pointer there—(takes pointer\*)—right over here near the corner or a little ways from the corner of the hatch there is a big mast, what is called a Sampson post—which is a big mast made out of steel?

A. Yes.

Q. And there are two booms attached to it?

A. That is right behind the winch driver.

Q. And there are two booms attached to that, which can swing in any direction?

A. Yes.

Q. One of them will turn in or out this way, and the other will turn in this way?

[fol. 108] A. Yes.

Q. Then there are steel cables which run from these winches or hoisting machines, which operate these booms and make them swing back and forth?

A. Yes.

Q. And the load is attached to that cable there?

A. Yes.

Q. So that when the winchman gets a signal from the hatch tender, who is over here at the rail, he hoists away and swings that boom, or pulls that line through the boom, so as to bring the load or get the load over just about as near to the middle of the hatch as he can?

A. Yes.

Q. And then he lets the load down into the hatch; is that the way they do it?

A. Yes.

Q. And when it drops down to the bottom of the ship, the men down there unload it, and he pulls the sling out again and swings it over in this direction on to the dock, and then the same performance is gone through again; is that it?

A. Yes.

Q. Now, when the men down below have unloaded the sling, why, then they call up that that load is over with, and the winch driver hauls it back out?

A. Do you mean after the load has been stowed?

Q. After it has been unloaded and after it is stowed?

A. And they put on an empty sling.

Q. Yes.

A. The hatch tender then gives the winch driver the signal to take out the sling.

[fol. 109] Q. Well, the winch driver is standing right there at the edge of the hatch; he can see that, can't he?

A. In this case, he could.

Q. Why not?

A. In this case, he could, I say.

Q. So there don't have to be a hatch tender there to tell the winchman what was going on down in the hold, because on this ship the winchman was in better position to see than the hatch tender was?

Mr. Horner: Now, just wait before you answer that question. We object to that; that involves a question of law.

Mr. Carey: Well, hardly that.

Mr. Horner: And it calls for his opinion on it.

Mr. Carey: No; I am asking him which of two men were in the better position to see down the hold.

The Court: He may answer the question.

A. Well, the hatch tender was because he could walk around and look at any position any portion of the hold that he wanted to.

Q. Yes; but the hatch tender if he wanted to see down in the hold had to walk from the rail of the ship over to the edge of the hatch and look over the side of the combing didn't he?

A. The hatch tender.

Q. Yes?

A. Yes.

Q. While the winch driver was there all the time?

A. But he could only see the aft end of the hatch.

Q. He could not see down in the hold at all?

[fol. 110] A. Well, he could not see the whole hold; no, sir.

Q. You have never worked as a winch driver?

A. No.

Q. And of course you never worked on this particular ship as winch driver?

A. No.

Q. You have never been in the position, and actually gone up

there and stood in the position where the winchman is on this particular ship?

A. No, sir.

Q. So you don't know of your own knowledge how far the winchman can see down in the hold on this particular ship?

A. Only by what I have learned from observing myself.

Q. But you never stood in his position and made any observation did you?

A. No, sir.

(Examination of witness suspended.)

And thereupon, the further trial of said cause was continued to May 2, 1924, at 9:30 A. M.

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[fol. 111]

May 2nd, 1924—9:30 a. m.

Trial resumed. Jury and all parties present as noted.

R. HAVERTY, the plaintiff, on the stand.

Cross-examination (continued).

By Mr. Carey:

Q. Now, I am not so sure but what possibly I got both you and the jury confused on one point here, and I want to straighten out one matter. Let this bag represent the hatch?

The Court: Are you going to introduce that bag in evidence, Mr. Carey?

Mr. Carey: I have no objection.

Mr. Litchman: Well, I don't think a bag like that should go in evidence—

The Court: Oh, well, go ahead.

Q. These booms with which this hatch was being loaded were attached to a mast that was off to the left of the winchdriver, was it not?

A. It was behind the winch driver.

Q. Behind him, and to the left?

A. Yes; one on each side.

Q. Then one of these booms was swung out over the side of the ship?

A. Yes.

Q. And another boom was swung so that the end of it was above the middle of the hatch?

A. Well, it happened to be a little to the forward end of the hatch.

Q. A little forward of the middle of the hatch?

A. Yes.

[fol. 112] Q. I thought possibly you misunderstood me yesterday. These booms do not swing with the load?

A. No, sir.

Q. They stay stationary?

A. Yes.

Q. And the load is moved forward and into the hold, and the sling taken back, by the pulling of the line through the pulleys on these booms?

A. Yes.

Q. You said that you were working in the square of the hatch. What do you mean by that?

A. Well, I mean by that that I was working right down in the opening of the hatch.

Q. That is, in the open part of the hatch?

A. Yes.

Q. Where you would be practically under the boom?

A. Under the boom.

Q. As it stood swung over the hatch?

A. Yes.

Q. You say that yourself and Hagey and McGinn were on the offshore side of the hatch?

A. Yes.

Q. Receiving the bales as they were coming down there, and that Cameron, Mowat and Oliver were on the inshore side?

A. Yes.

Q. Now, do you remember the names of the two men who were on the dock handling the slings there?

A. Yes; Mr. McKellon and Mr. Perry.

Q. Then the winchdriver you said was Deerholt?

A. Deerholt.

[fol. 113] Q. And the hatch tender was Lee Carls?

A. Yes.

Q. Now, the boss of the entire gang was a man named Alder, was it not?

A. Yes.

Q. Now, as a load is descending into the hold by these lines which the winchman operates, the winchman by the operation of his winch can stop or start that load at any point on its way down?

A. Yes.

Q. And if he is letting that load descend, and he looks into the hatch and sees there is any danger of any one being hurt, it is his duty to stop then and there?

A. If he can see in there, yes.

Q. Now, you men down there in the hold receiving loads as they were landed on the deck, you would take them out of the sling and truck them back, would you not? Back into the hold of the ship?

A. No, we did not have no hand trucks.

Q. How did you get them back? Did you roll them back?

A. Yes.

Q. How far back from under the hatch were you putting these bales at that time, the time before you were hit?

A. Well, Mr. McGinn and I were at this particular time were stowing right in the hatch.

Q. Right close by the hatch?

A. Yes.

Q. This hatch was known as No. 8 hatch?

A. Yes.

Q. And it was the last aft hatch on the ship?

[fol. 114] A. Yes.

Q. In the extreme stern of the ship, where the ship starts to come together, narrow up and come together?

A. Yes.

Q. So that the space underneath Hatch No. 8 is not as wide as you find in the hatches up amidship?

A. No.

Q. Now, this bale that hit you did not fall loose from the sling; but it just came down in the sling and hit you?

A. Well, it was not one bale that hit me; it was a sling load.

Q. Yes; the load, that is what I mean, at the time it hit you it was still attached to the line; and it did not fall loose from the line?

A. No, sir.

Q. But it was a load that the winchman let down there?

A. Yes.

Q. Who was the doctor that attended you?

A. Dr. McLoughlin.

Q. How long did he attend you?

A. Oh, about three or four months.

Q. You said you were in the hospital about three weeks?

A. Yes.

Q. And then you went home?

A. Yes.

Q. Did the doctor call on you at your home, or did you go to his office?

A. I went to his office.

Q. So at the end of three weeks, after you got out of the hospital, you were sufficiently recovered so you could go down to see the doctor at his office?

[fol. 115] A. Yes, sir.

Q. You were not laid up in bed?

A. No, sir.

Q. Was there any other doctor who attended you?

A. Well, yes, I was examined by two more doctors.

Q. But Dr. McLaughlin was the man who actually attended and took care of you?

A. Yes.

Mr. Carey: I think that is all.

# Redirect examination.

By Mr. Horner:

(Putting drawing on the board.)

Mr. Horner: Will you gentlemen agree that this approximately represents the formation of a ship and the construction of the ship?

Mr. Carey: Yes.

Mr. Horner: While it is not accurate, it will illustrate the point sufficiently true and correct for the purpose which both sides want to use it.

Q. Now, Mr. Haverty, if you will come down here and show the jury and so that the jury can see this, too. It is agreed that this approximately represents a ship, and that here are slings and booms; and this would be what did you call it, the Sampson post?

The Court: I do not think that all of the jurors can see that.

Mr. Horner: Well, you had better come down here, because if you don't know any more about a ship than I do, you need some education.

Q. Now, get back here so you won't obscure the view of the jury. [fol. 116] Now, it is admitted that that represents the ship approximately; and these openings here would be the hatches?

A. Yes.

Q. And this back here is the propellor?

A. Yes.

Q. And this would be the hatch No. 8?

A. Yes.

Q. Where you were working?

A. Yes.

Q. And here would be the other hatch?

A. Yes.

Q. Up here is the middle of the boat, and up here is the forward end of the boat?

A. Yes.

Q. Of course, we are really interested only in the hatch where you were working. Now, at the time you were working down in here (indicating); is that correct?

A. Yes.

Q. And this hatch is simply like an elevator shaft, isn't it?

A. Yes.

Q. And in here would be the floor of the hatch, and the space would be around under the hatch back in here?

A. Yes.

Q. It would be just like a hole in the floor?

A. Yes; this is the square of the hatch, and the space is around in here (indicating).

Q. And there are empty spaces around in here on each side to be filled up?

A. Yes.

Q. Now, along in each one of these are bulkheads?

[fol. 117] Q. Those are put in there so that if the ship gets busted in here the water won't run all over the ship; and it is to protect the crew?

A. Yes.

Q. Now, you were working down in here?

A. In the lower hold.

Q. I believe to get it correct this goes right down into the water?

A. Yes.

Q. And this would be the hatch from here to here (indicating)?

A. Yes.

Q. It is simply a hole down from the top deck of the boat?

A. Yes.

Q. And it was approximately twenty feet square?

A. Yes.

Q. And Mr. Bigham gave us the figures, I believe?

A. That is about it.

Mr. Carey: 24 feet by 21 feet.

Q. Now, how far was it from here, the top deck, down to where you were working, approximately?

A. I estimate it between forty and fifty feet.

Q. And here would be where the winchdriver would stand?

A. Yes.

Q. Now, that winch is simple enough; it is more of a sort of a donkey engine, isn't it?

A. Yes.

Q. You could call it that?

A. Yes.

Q. It is a steam apparatus that pulls these cables back and forth?

[fol. 118] A. Yes.

Q. Now, this object in here, there are cables attached to all of these objects?

A. Yes.

Q. And when the man swings these around, over onto the dock, and the men there ties on the load, and then the winchdriver gives the signal—not the winchdriver but the hatch tender when the load is all tied on he gives a signal to the winchdriver, and the winchdriver lifts it up over the hatch?

A. Yes.

Q. And then the hatch tender gives the signal "look out below" to the men down in the hatch where they are——?

Mr. Carey: I think, your Honor, that the witness ought to be permitted to describe this operation, rather than counsel.

The Court: Yes, I think so.

Mr. Carey: The fact of the matter is, he is wrong about several of those statements.

The Court: All of the questions are leading.

Mr. Horner: I thought there was no dispute about it, or about that part of it; it would be leading if there was any dispute about it; but I did not think there was any dispute about it.



Mr. Carey: You have got far past the point where we admit those things. Part of that is admitted, but part is not.

Q. Then I will ask you to describe then how the load is handled this being the hatch and this being the winch, and these being the booms. Now, describe how the load is taken off the deck and put into the hold?

A. Off the deck, or off the dock?

[fol. 119] Q. Off the dock, I should have said?

A. First, it is hooked on. Well, first, it is put in the sling and then it is hooked on, and the hatch tender sees that the load is slung all right, and everything is all right, and then he gives the signal to go ahead, and then the load is picked up from the dock and taken onto the deck of the ship; and then the hatch tender walks over and looks down into the hold and sees that everything is all right, and then he sings out "look out below," as a rule when all is clear, and everybody is out of the way in the hatch, he gives the winchdriver a signal to come in with the load.

Q. Now, that singing out is simply hollering out "look out below," a warning?

A. Yes.

Q. Now, I believe you said that there had been, just before you were hurt, there had been probably about fifteen loads, brought in?

A. About that.

Q. You had handled about that many?

A. Yes.

Q. When this one came in that was just prior to the time you were hit?

A. Yes.

Q. Now, on the one that hit you, did the hatch tender sing out on all these previous loads before you were hit?

A. He had.

Q. Now, did he sing out or warn you on the one that hit you?

A. No, sir.

Q. You are sure about that?

A. Yes, sure.

[fol. 120] Q. Now, I will ask you—you said you were working in this hold here?

A. Yes.

Q. Now, to make this clear, when you get this hold filled up with goods, what do you do with the hatch?

A. Put the hatch on.

Q. You cover them up?

A. Yes.

Q. You cover them up and then you proceed to load this deck, and when you get this filled up, you cover up this hatch, and then you fill the other deck?

A. Yes.

Q. What do you cover these hatches with?

A. With wooden hatch coverings.

Q. It is a big cover?

A. Yes.

Q. Now, this illustrates a ship, and this is the back end here where the propellers are, the rear of the ship. Just state where the winch driver was when you were hit?

A. He was at the winch. That represents the winch where it comes along the hatch.

Q. In all of these previous loads you had, and for which the hatch tender sung out, where was the hatch tender?

A. When they came in with the load, he was standing over the hatch.

Q. Where would he be when he would sing out?

A. Over the hatch.

Q. This place from here to here would be what you would call the hatch combing?

A. Yes.

Q. That is on the top deck?

[fol. 121] A. Yes.

Q. And that hatch combing is nothing more or less than a sort of an iron fence built around the hatch?

A. Yes.

Q. To keep people from falling into the hatch?

A. Yes.

Q. Now, what would the hatch tender do when he would sing out?

A. What would he do?

Q. Yes.

A. When he saw everybody was out of the way, he would give the signal to come in the hold with the load.

Q. Now, I believe you stated you got no warning from any one at the time you were hit, you did not get any warning from any one?

A. No, sir.

Q. Now, illustrate, if the winchman is in that position how much the winchman can see down into the hatch?

A. Well, from where he is standing here, he can see the aft end of the hatch, but he cannot see under there.

Q. It is just like looking down any other hole; you can see in the further side of it, but the hatch tender if he looked over there, he could see over in here; but of course he could not see back in here?

A. No, sir.

Q. Because it would be under here; I mean the winchdriver could not?

A. No, sir, the winch driver could not.

Q. And that would be true also if the man were over here, he could see over here, but he could not see down in here; that is correct, is it?

[fol. 122] A. Yes.

Q. It is just a simple question of a simple physical fact?

A. Yes.

Q. Now how does the hatch tender regulate that; how does he manage to see whether it is clear all around the hold before the load is lowered?

Mr. Carey: Do you mean the hatch tender or the winch driver.

Q. I mean how does the hatch tender manage to ascertain that the coast is clear, and that the men are safe?

A. Well, he can see the whole hold from any angle; if he cannot see it from here, he can from here; and he could walk over here. (Indicating.)

Q. In other words, he can walk clear around the hatch combing?

A. Yes.

Q. And if he looks down in here, or if he gets over here, he can see the men in here?

A. Yes.

Q. And if he gets over here, he can see the men down in here?

A. Yes.

Q. Now, the winch driver cannot do that, can he? When he is standing by his engine, can he?

A. No, sir.

Q. Now, using that illustration there, just before you were hit, I think you testified you had not finished taking care of the previous load, had you?

A. No, sir.

Q. Now, where were you working? Using this as an illustration, and this is representing the rear end of the boat?

A. Here is where the hatch comes; and I was working about here; [fol. 123] about four or five feet out from the hatch.

Q. You were working about four or five feet out from the what?

A. From the hatch. You see this is the way the hatch comes right straight down, and I was working about four or five feet out from from there into the hatch.

Q. Now, could you have been seen, if any one had looked down the hatch?

A. If the hatch tender had looked, he could have seen me.

Q. If the hatch tender had looked he could have seen you?

A. Yes.

Q. Now, where were you stowing? In which end of this compartment were you stowing this wool?

A. In the forward end.

Q. In the forward end; that would be the end up this way (indicating)?

A. Yes.

Q. You were working over here?

A. Yes.

Q. Now, who was working over here with you?

A. Mr. McGinn.

Q. Now, who was working over here in the other compartments? There were two sets of you, as I understand?

A. Mr. McGinn and I were working midships, and Mr. Hagey was over in here, over this way.

Q. He was over this way?

A. Yes.

Q. It is properly divided as the fore and aft part, or as the inshore and off shore sides of the boat?

A. Yes.

Mr. Horner: Is it satisfactory to show this to the jury?

[fol. 124] (Indicating book to Mr. Carey.)

Mr. Carey: Yes.

Mr. Horner: In this book there is an end view of the hatch in a ship, and you may look at this. This is looking down towards the end of the ship aft.

(Book given to jury for examination.)

Q. (Showing same to witness.) This approximately illustrates an end view of the boat?

A. Yes.

Q. This is what represents the posts, and using this as an illustration, you were working down in here?

A. Yes (indicating). This is the hatch in the center and these are the decks.

Q. The lower deck of the hold?

A. Yes.

Q. And that approximately represents the hatch?

A. Yes.

Q. Now, using this illustration as an end view, this is the hatch and the combing; now, show the jury where you were working?

A. I was working right about there (indicating).

Q. This (indicating) is supposed to be the end view of the boat? Have you got that clear in your mind, looking down the ship? This view (indicating) is a sideways view and this is looking back towards the aft end of the ship?

A. Yes. Well, now, this is the top of the hatch; and the winch driver would be here.

Q. Would be in here, of course, and he would be back here; this is supposed to be the end view?

A. Well—(examining drawing).

[fol. 125] Q. Now, you are looking down the ship the long ways?

A. I don't understand it yet.

Q. Let's see if I can get you to understand it. Suppose you were back here and you were looking down the boat. Suppose you were standing back here, it looks like this, don't it?

A. No, I don't believe I understand you.

Mr. Carey: May be I can point it out to him. (Showing witness)

A. Yes; I think I understand it now.

Q. You were loading on each side in here, and back here? (indicating on drawing)

A. Yes.

Q. Now, it has been brought out here, Mr. Haverty, that the winchdriver cannot see on the dock when the boat is empty; or when the boat is high out of the water; is that right?

A. When the ship is high, no, sir, he cannot see on the dock.

Q. But when the ship is low; that is, when it is about loaded it sinks down into the water, and then he can see on the dock?

A. Well, sometimes he can do it; and sometimes he cannot.

Mr. Carey: If the side of the ship is high, he cannot see?

A. No.

Q. But there are times when he can see on the dock, when the tide is low, and the boat is loaded?

A. Yes, there are times when he can see on the dock.

Q. Yes; and when he cannot see upon the dock, does he depend upon the signals from the hatchtender?

A. As a rule, yes.

Q. Does he at all times depend upon signals from the hatch [fol. 126] tender?

A. He does.

Mr. Horner: That is all.

Recross-examination.

By Mr. Carey:

Q. How was the boat at this particular time? The loading was completed, was it?

A. No, sir.

Q. Do you remember what the condition of the tide was, whether it was high tide?

A. Well, it was pretty high; but I don't know just when it was high tide.

Q. So that the boat would be pretty well up above the dock?

A. Yes.

Q. Now, this lower diagram, as I understand it, would be just the same as if the after end of the ship was cut off just after of hatch No. 8. just as it we sliced off the end of the ship, or if we could see without slicing off the end and looking forward, that is approximately what we would see? You understand that, do you?

A. Yes.

Q. So then of course this part sticking up here that I am pointing at represents the hatch combing on the end of the hatch nearest the back of the ship?

A. Yes.

Q. Now, the winch driver would be out in front of the corresponding hatch combing, on the opposite side of the hatch and forward of the hatch?

A. I don't believe I understand that.

Q. Well, then, I will pass that. I think you have already stated [fol. 127] that these winches were situated right close to the hatch combing, just leaving barely enough room for the winchdriver to stand there and operate the winchs?

A. Well, enough—I don't know just how much room there is there.

Q. You have never been in that exact position yourself so you don't know exactly how they stand?

A. No, sir, I have not.

Q. So when you undertake to say how much of the hatch below the winchdriver can see, and how much he cannot see, you are basing your judgment—you are basing your statement on your judgment, and not from any actual observations you ever made yourself from the winch driver's position?

A. Only what I have observed and could figure out.

Q. Only what you have figured out might be — case?

A. Yes.

Q. Now, so far as you know, there is no reason why the winch driver cannot see right straight down from the top deck and right down to the bottom deck by looking right from the winch right over the hatch combing, is there?

A. I hardly think he could.

Q. He could not see back under the floors, or the decks, of course, but he can see directly down from the top to the bottom in a vertical line by simply looking over the hatch combing, at least, so far as you know?

A. Well, it seems to me like he would have to lean a long ways over the hatch to look down into it.

Q. What I am trying to bring out is, you yourself have never stood in the position of the winch driver?

A. No.

[fol. 128] Q. So that from your own actual observation, you don't know what he can see and what he cannot see?

A. Sure, I don't.

Mr. Carey: I think that is all.

Redirect examination.

By Mr. Horner:

Q. Could he attend to his winches, and watch his load, and also at the same time keep watch down in the hatches to see where the men were? Could he do all of those things at once?

Mr. Carey: Just a minute; it is very apparent that these questions are calling, not for facts that this witness knows, but for his opinions upon things he does not know.

The Court: Very well.

Mr. Carey: And I object upon that ground.

The Court: Objection sustained.

Mr. Carey: And on the further ground that it is not proper re-direct examination.

The Court: Obiection sustained.

Mr. Horner: What is the Court's ruling?

The Court: Well, I think that is a conclusion of the witness,

and are his opinions on fact that the jury themselves will determine from the evidence in the case.

Mr. Horner: Well, I will let it go at that; that is all,

(Witness excused.)

[fol. 129] DAVID MADISON, a witness on behalf of the plaintiff, was duly sworn and testified as follows:

Direct examination.

By Mr. Horner:

Q. What is your full name?

A. David Madison.

Q. Where do you live?

A. R. F. D. No. 3, box 263, Seattle.

Q. What is your business?

A. Longshoring.

Q. How long have you been a longshoreman?

A. I have been longshoring and sailing since I was fourteen years old, and I am now forty-one; I never have done anything else.

Q. How much of that has been sailing and how much of it longshoring. Which has it been? Mostly sailing or mostly longshoring?

A. Mostly? I have been practically longshoring since 1914 in Seattle, except a boat where I sailed in about eighteen months.

Q. Have you longshored on different kinds of vessels?

A. Yes, and for all of the different companies in Seattle.

Q. What are the duties of a hatch tender. I will ask you first what is a hatch tender?

A. A hatch tender is the man that comes aboard ship and he is supposed to rig up the booms after being told what hatches he is supposed to work with, and he then rigs up the booms and sees the falls are all safe, and see that the hatches are taken off, and everything is attended to properly, and then when they are ready for the cargo, for instance, in the case of discharging cargo, he sees [fol. 130] the cargo is hooked on and have decent sized loads, he then gives signals to the winch driver; and in some cases there are two winch drivers and in some cases there is only one; and the winch driver stands by waiting for him to give the signals to take out the loads; and then he goes over to the rail, so as he can see the space, and see that the load is out of the hold, he goes over to the rail and sees that every one is clear on the deck and also on the dock, and then gives the signal to lower the load onto the dock. Then if you are loading, like they was in this case, he does on the deck and sees that the loads is safely hooked on and gives the signal to the winch driver to lift the load off the dock, and after he sees it gets up clear of everything, and then he runs over to the hatch and he gets over there before the load does, and he looks down into the hold to see that every one is clear; and if everything is not clear then he gives a signal to the winch driver to hold the load on the deck until



every one gets away down below, and then if every one is clear of the way, he sings out "Stand clear below" so that in case any one should be out from the side of the hatch they can get out of the way, and then he gives the signal to the winch driver to come down on his boom with the load into the hold.

Mr. Horner: That is all.

Cross-examination.

By Mr. Carey:

Q. Now, taking this case, and assume that the winch driver cannot see down into the hold where he is going to place the load, and he received no signal from the hatch tender what is he supposed to [fol. 131] do? Is he supposed to let his load go or is he supposed to hold it?

A. He is supposed to hold the load until the hatch tender is where he can see it.

Q. So in case the winch driver cannot see where the load is going, and he receives no signal from the hatch tender he is supposed to hold his load right there; is that correct?

A. He is not supposed to go ahead on the load or lower it or touch it before he can see the hatch tender and the hatch tender is in position where he can give him the signal.

Q. And if a winch driver in that situation, without being able himself to see, and without getting any signal from the hatch tender, goes ahead and lowers his load, he is doing something that he should not do; is that correct?

A. Absolutely.

Q. Now, did you ever happen to work on this Luchenbach boat, this Andrea Luchenbach?

A. I am not sure; I have worked on most of them, but I am not sure whether I worked on that one particular boat or not.

Q. These ships are not all rigged alike, are they?

A. No.

Q. On the deck?

A. No.

Q. Some ships are so equipped that the hatches have to be worked with two winches, and some of them only have one winch; and some of them have winches in pairs; is that correct?

A. Yes; there are few ships that have only one winch nowadays.

Q. Yes; the more modern ships have winches operated in pairs?

A. No; the European ships most of them have two winches, with one man to each winch. But the Luchenbach ships, for instance, [fol. 132] those allow one man to operate two winches in no other ports in the world but on the Pacific Coast.

Q. On these Luchenbach ships, the two winches are arranged so that one winchman as he stands in between these winches can operate one winch with one hand and the other winch with the other hand?

A. Yes.

Q. And he is standing right at the edge of the hatch, is that correct?

A. On some of them; on some of them he cannot see very far down.

Q. But you do not know how it is on this particular ship?

A. No, I am not sure whether I ever worked on her or not.

Q. Now, which is the safe operation? For the winch man to depend upon signals when he gets them from some third man or from some other man, the hatch tender, for instance, or for him to operate his winch when he is himself in position to see himself what is going on? In other words, if a winchman is in position where he himself can see what is going on, does he under those circumstances depend upon getting signals from some other man?

A. He should always depend upon signals.

Mr. Horner: We object to that.

The Court: Just a minute. Upon what ground?

Mr. Horner: Well, we will withdraw the objection. If you can get anything out of it with the jury, go ahead.

Q. Is that your answer, that he should always depend upon signals?

A. Yes, he should always depend upon signals; if he don't, he is violating the rules aboard ship.

Q. So that in case a winchman has hold of a load, and he wants to drop it in a particular place, and he can see just exactly where he wants to put it, you say that instead of looking himself to see [fol. 133] and putting it there, he should rather act upon the signal of another man?

A. Yes.

Q. Thus complicating the situation by having the judgment of two men rather than the judgment of one; is that your understanding of it?

A. Pardon me, but it is not complicated, and I will illustrate there is no ship where a man can see absolutely as you try to say. They cannot do it, because they cannot see two men, or a half dozen, working right under where they are standing.

Q. Well, that may be?

A. He may see part of it on every ship, but he cannot see all of it, as the hatch tender can see it.

Q. Yes; I think every one will agree that neither the hatch tender nor any other man or human being can look down into the hold of a ship and see under the decks?

A. Yes; the hatch tender can.

Q. The hatch tender can?

A. Yes, because he can walk all around the hatch in different positions.

Q. But the winchman can see if he is standing on the edge of the hatchcombing; he can see directly down, can't he?

A. In some ships he can, and in others he cannot.

Q. Well, you don't know about this ship?

A. Well, in this case, take the average Luchenbach ship there is no ship where he can see underneath, but he may be able to see crossways, and see the forward part of the hatch he standing aft the hatch.

Q. If he is standing on the forward part, I am talking about this particular ship now, and I am not talking about some other ship? [fol. 134] A. Yes.

Q. If he was standing on the forward part of this hatch?

A. Yes.

Q. Do you mean that he cannot look over the combing and see directly down?

A. He can see perpendicularly right down, the same as looking down the side of this chair.

Q. Yes; and likewise a man underneath can see perpendicularly up?

A. Yes.

Q. And if a man was below and was standing in the square of the hatch, approximately in the center of the hatch, the winchman can see him, couldn't he?

A. Absolutely.

Q. Do you remember the length of the booms on this ship?

A. No, sir.

Q. Or the relation of the booms to the hatch?

A. No; but all the Luchenbach ships have good long booms.

Q. Say that the boom is swung over the hatch, where would the top of the boom be with reference to the exact center of the hatch?

A. If he was working in the forward end of the hatch, which I believe he was he would naturally have the boom tipped up so that it was pretty close forward to cover that space he was working and if they were working on the other end of the hatch, he would have his boom tipped the other way.

Q. Then they move the position of the boom, depending upon where they are loading?

A. Yes. It is never in the center; it is always swung to one [fol. 135] side or the other; always to one side.

Q. It is always placed to the one side or the other; is that correct?

A. Yes; it is always to one side.

Mr. Carey: That is all.

Redirect examination.

By Mr. Horner:

Q. You say that the winchdriver always depends for signals upon the hatch tender?

A. Yes.

Q. Why is that?

A. Well, in the first place, when longshoring work first started there was no such thing as double winches; there was two winches, and set back from the hatch, on all European ships and many

American ships where it is impossible for the winchmen to see down in the hatch, and always at any time whether with single or double winches, always for the safety of the ship they should be there. In the states where there is a law passed——

Mr. Carey: Wait a minute. I think he has gone far enough.

The Court: The objection will be sustained to that last statement.

Mr. Horner: They went into that, and I think we have the right to develop that fact.

The Court: No, I think not.

Mr. Horner: Develop the full phase of the question hearing upon that subject.

The Court: Well, let remain in the record what he has testified [fol. 136] to so far, but I think he is going beyond the limit.

Q. Mr. Madison, could a winch driver attend to his winches, and at the same time keep track of the men down below?

Mr. Carey: Just a minute; I object to that as being a question for the jury; and particularly in view of the fact that this man was not on this ship at the time this accident happened.

The Court: I will sustain the objection to that question.

Mr. Horner: That is brought out by the answers, the things he was saying at first. They went into this matter themselves, and I have the right to show the winch driver could not——

The Court: Well, you may. This witness said he was not familiar with the location of these particular winches; and unless you show the position of the winches and the distance from the hatch combing.

Q. Could a man, with double winches—I will put this question this way, and do not answer it until the Court rules, because we do not want anything in the record that is not correct. With the ordinary sized double winch on modern steamships such as the Luchenbach was, could the winch driver attend to his duties of handling the slings and handle his winches, and also keep track of the position of the men down in the hatch?

Mr. Carey: Now, just a minute—are you finished.

Mr. Horner: Yes.

Mr. Carey: Now, I object to that for the reason that according to the witness' own testimony there is no general plan for the arrangement of these ships, every ship is complete to itself; and what might [fol. 137] apply on one ship would not apply to another; and the witness has said that he does not know the arrangement on this particular ship; and I object to that question for the reason that his opinion based upon that hypothesis would be of no value to the jury.

The Court: I will permit you to show, if you can, the location of the winches, and the duties of the winch driver, and how much of his time is taken up when he is loading and unloading; and then it is for the jury to say how far or how much he can see of the men. You understand, ladies and gentlemen of the jury, that in ruling

on the admissibility of evidence, and in making any remarks, I am not intending to comment upon the evidence at all.

Q. I believe you stated already—well, it is a fact that the winch driver is stationary, isn't he? He cannot run around the hatch?

A. No, sir.

Q. He has to be in one position standing by his levers?

A. Yes.

Q. The same as an engineer on an engine, he has to be right there?

A. Yes.

Q. Now, is it possible for a winch driver to attend to his engine and see do-n into and all around in the hold of a ship?

Mr. Carey: Just a minute. I make the same objection. It's practically the same question he asked before.

Mr. Horner: Well, I certainly want to comply with the Court's ruling, but perhaps I have not.

The Court: What I said, Mr. Horner, was that you might show [fol. 138] the position of the winches, the duties of the winch driver, and how much of his time is taken up while loading or unloading as they were in this case, and then it is for the jury to determine how much of his time he would have to examine the hatch and watch the men below.

Mr. Horner: All right, I will begin with that question.

Q. What are the duties of a winch driver?

Mr. Carey: I object to that, because he has already gone over it. This is redirect examination.

The Court: Yes; unless Mr. Madison knows the conditions on this particular ship, he would not be qualified to testify to that. He has already testified generally as to the duties of a winch driver.

Q. Mr. Madison, in loading a ship, in loading say the lower hold, are the goods stowed all around the hatch?

A. That all depends; there are some ships in which you can stow part of the cargo in the forward end, some of it might be for Philadelphia, and some of it for New York; you never know where you are going to stow it; but take it all through you have to start out filling up the entire hatch, and you start out in the center and fill up the center hatch as a rule.

Q. Assume that you are going to fill up the entire hatch, are the men required to go all around the hatch?

A. Yes.

Q. That being true, would it be possible for the winch driver to see them in all of the positions they would be in in the hold of the ship?

Mr. Carey: Just a minute—

[fol. 139] Mr. Horner: We will take a ruling on that.

Mr. Carey: I make the same objection. Substantially that the same identical question, whether a winch driver could or could not

see depends upon conditions on this ship, and not on some other ship; and this witness has already stated that he had no familiarity with this ship sufficient for him to testify. He cannot guess about what the situation is; and he has not shown any familiarity with this particular ship.

The Court: I will sustain the objection to that question.

Mr. Horner: I will ask one more question, and then I will take the exception.

Q. Assuming that the winches were between the Sampson post and the combing of the hatch, and—could the winch driver see those who were working directly under him in the lower hold?

Mr. Carey: Just a minute. I object to that on the ground that that question calls for just the ordinary application of a well known law of physics, and the jury is just as able to pass upon that as the witness.

The Court: I think that question has been answered by this witness already.

Mr. Horner: I will say this, that in the testimony of the plaintiff in this case, as your Honor will remember and also the jury will remember, that he did testify that where they are loading, they are not only in the hatchway, but also around underneath this deck and that deck, and are underneath in places where the winchdriver could not [fol. 140] possibly see them. Now, this question is based upon that testimony; in other words, to ascertain whether or not it is possible for the winchdriver to see these men.

Mr. Carey: He just testified in the question he answered that he could not see underneath the decks.

The Court: Before this witness could answer intelligently he would have to know the location of the winches, and the winchdriver, and how far it was from the hatch combing. If you want to put a hypothetical question embodying the testimony that has been produced as to the position of the winches with reference to the hatch combing, and the other parts of the deck, I will let the witness answer that kind of a question.

Q. Now, assuming that the winch is located between the Sampson Post, and the combing of the hatch, and that it is in the middle of the boat, on the forward end of the rear hatch and the hatch—the winchdriver was located there, could the winchdriver see those who were working directly under him in the fore part of the after hatch?

A. No, sir.

Mr. Carey: I object to that for the reason that it does not show the location of the winch.

Mr. Horner: I was using this map here.

The Court: Well, now, Mr. Horner, you say between the Sampson post and the open hatch and the hatch combing?

Mr. Horner: Yes.

[fol. 141] The Court: How long a distance is that? Is that several feet?

Mr. Carey: It is a very considerable distance.

The Court: Well it would depend entirely then on the location of the winch, it seems to me.

Mr. Horner: Well, we will assume that the location of the Sampson Post extends several feet from the hatch-combing, could the winch driver see the men down in this part of the ship (indicating)?

Mr. Carey: I object to that.

The Court: I think the question is still objectionable. If you want to incorporate in your question the exact or the approximate location of the winches with reference to the hatchcombing I will permit him to answer; but he might be thinking of the winches being in a certain location between the Sampson Post and the Hatch-combing, while the jury might be thinking of it in another position.

Q. Assuming that the hatchcombing is about seven feet from the Sampson Post, and the winches are located between the Sampson Post and the hatchcombing in the center of the ship, then could the winch driver see those who were working underneath him?

A. No, sir, he could not see them.

Mr. Carey: No, just a minute; he answered before I could possibly object.

The Court: Oh, I will let him answer that question, and you may develop it further on cross examination.

A. He could not see anybody working directly underneath him.

Q. In other words, in order to see all around the hatch on the lower deck, he would have to run clear around the hatch on top [fol. 142] deck?

A. Yes.

Q. He would have to go clear around it so as to see where the men were?

A. Yes.

Q. And if the hatch was 21 by 24 feet, to make a trip like that he would have to walk over a hundred feet approximately?

A. Yes.

Mr. Carey: I think it is quite probable that the jury knows that just as well as this witness or Mr. Horner.

The Court: I will sustain the objection.

Mr. Horner: Well, let's be gentlemanly about the matter.

Mr. Carey: I am not being ungentlemanly.

Mr. Horner: We want to get these points all clear, because that is our case.

The Court: That is a matter for the jury; and the jury can determine that.

Mr. Horner: Yes; but sometimes we overlook the very simplest things in the world.

Q. Well, could he run that winch and at the same time keep walking around the hatchcombing?

Mr. Carey: We will admit he could not.

Q. Looking to see where the men were?



Mr. Carey: You need not spend any time developing that. We will admit that he could not.

Mr. Horner: That is what I want you to admit that he could not attend to his duties on the winch and at the same time keep watch of the men below.

Mr. Carey: No; we will admit he cannot run the winch and be away from his winch at the same time.

(Witness excused.)

[fol. 143] WILLIAM CAMERON, a witness on behalf of plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Horner:

Q. What is your name?

A. William Cameron.

Q. Where do you live?

A. 4608 Holly Place.

Q. How long have you lived in Seattle?

A. About fifteen years.

Q. And your business?

A. Longshoreman.

Q. How long have you been in the longshoring business?

A. About twelve years.

Q. To what extent have you worked at it? That is, how much of your time have you spent at it, or have you had any other business.

A. I have put in twelve of the fifteen years I have been here at longshoring.

Q. That is your only business? That has been your only business?

A. For that twelve years.

Q. How much of that time has been in Seattle?

A. How much of the twelve years? Twelve years.

Q. How?

A. The full twelve years.

Q. The twelve years in Seattle?

A. Yes.

Q. Where were you on the 21st day of May, 1923?

A. I was working in the hold of the Andrea Luchenbach.

[fol. 144] Q. Who else was with you?

A. Mr. Hagey, and some more men, the injured man, Mr. Haverty, and the other men, only Oliver, he is not here.

Q. Well, you were there with Haverty at the time he was hurt?

A. Yes.

Q. You were there working as a longshoreman?

A. Yes.

Q. Now, who was the winch driver on that occasion?

A. Mr. Deerhoit.

Q. Mr. Deerhoit was the winch driver? Who was the hatch tender?

A. Lee Carles.

Q. Do you know where Lee Carles is?

A. I could not say.

Q. Now, about that what time of day did this accident occur?

A. I should judge it was somewhere around nine o'clock.

Q. What time do you fellows start to work?

A. Eight o'clock in the morning.

Q. And you had been working then less than an hour before this accident occurred?

A. Somewhere around an hour.

Q. Do you recall approximately how many loads had come down before Mr. Haverty was injured?

A. No; I could not say how many loads.

Q. Well, had a number of them come down?

A. Quite a few; we had been working about three quarters of an hour on the freight.

Q. What were you loading?

A. Well, I should judge it was wool; I am not positive; it was heavy pressed bales; I believe it was wool, though.

[fol. 145] Q. How was that wool done up? I haven't got it clear in my mind just how the wool was done up, when it was loaded there that day?

A. Well, it had an outer covering on, something like gunny sacking, wrapped around with steel bands, and compressed very tightly.

Q. What is the shape of it?

A. Well, it might be 2 x 2 or 3 x 3, roughly somewhere around there.

Q. How many of those bales would be taken at a sling load?

A. Generally four; there was four that morning.

Q. How much would each bale weigh, I call it a bale, how much would each bale or package weigh, approximately?

A. Around four hundred pounds.

Q. Then four bales, of course, would weigh around 1,600 pounds?

A. Yes.

Q. How many were there in the load that struck Mr. Haverty?

A. Four.

Q. Were you there present at the time Haverty was struck?

A. Yes.

Q. Now, state, Mr. Cameron just what occurred?

A. Well, I was working on my load on one side of the ship, and Mr. Haverty was working on another load, just about the center of the hatch, or a little closer forward to the center of the hatch; and there was two loads in the hatch at the time, when another load came in, and descended right directly on him, and struck him, while he was working on the load he had not yet put away.

Q. Do you mean a previous load, a load that had just come down just before the one that hit him; is that what you mean?

[fol. 146] A. Yes.

Q. Did you fellows, you men, who were working there, receive any warning or signal to inform you that this load was coming down?

A. No sir.

Q. Are you positive of that?

A. Yes.

Q. Were you expecting a load at that time to come down?

A. No.

Q. Why were you not expecting it?

A. Because there was a load for each six men down there already; and we had a load for three men on one side, and one load and three men on the other side; and naturally, you would not expect another load to come in while we were still working on those loads.

Q. In other words, you had not taken care of what you had already?

A. No.

Q. And you would not need one more load until you had already taken care of what you had already?

A. No sir.

Q. Explain to the jury, what you mean, when you say you were taking care of one side, and Haverty was taking care of the other?

A. Well, if there is six men in the hold, three men takes care of one load, and then the next load coming in the other three men take care of, and so on, back and forth; the next load we would take care of; and the same way with the crew on the other side, take load after load.

Q. How far apart were the two groups of men, as I will call them?

[fol. 147] A. The two groups of men?

Q. Yes; you were taking care of one side, and they were taking care of the other; and how far apart would you be?

A. Oh, about fifteen or twenty feet.

Q. Not any further then, approximately, than I am from you now?

A. Well, a little further.

Q. Now, were you working on the inshore or the offshore side?

A. The inshore side.

Q. That would be on the side of the boat next to the shore?

A. Yes.

Q. Next to the pier, rather?

A. Yes.

Q. And they were working on the side away from the pier?

A. Yes; that is, more in the center of the hatch.

Q. How far is it approximately from the top of the hatch, or the top of the boat, the deck, down to where you fellows were working?

A. Well, I should judge around fifty feet.

Q. Around fifty feet?

A. Yes.

Q. How many decks, as I will call it, were there on that boat?

A. I believe there were three decks on the boat.

Q. I will ask you to look at this drawing? Can you see it from there?

A. I can go close to it, anyway.

Q. Assuming that this upper drawing there approximately represents, or, does it represent, approximately the ship?

A. Yes.

Q. Now, where were you fellows working, assuming that representation [fol. 148] sends the ship, about where were you working?

A. We were working about here (indicating on drawing).

Q. Down in the lower hold?

A. Yes.

Q. Where were you loading your stuff?

A. About here, (indicating on diagram).

Q. On the lower deck?

A. Yes; in the lower hold.

Q. Now, just beginning—you had received—you say you had received some load before that?

A. Yes.

Q. Now, were you warned of the coming of those loads before that?

A. Of the loads before that? Yes.

Q. You received warnings of them?

A. Yes.

Q. Did you receive any warning of the load coming that hit Mr. Haverly?

A. No.

Q. Explain then to the jury, in your own way, just how—using these as an illustration there, just how the loads are handled on the boat at that time, in the handling of the wool?

A. Well, the load was loaded on the dock alongside of the ship in a sling, and it is wrapped around it, of course; and then the hatch tender sees it is safely attached and hooked, and lifts it up, and takes it across the ship, and down into the hold; but he is supposed to go from the rail of the ship to the hatch combing, that is, around the edge of the hold, and he should be there in time before the load goes [fol. 149] over there, and see that it safely arrives at the hold, and look out for the men, and see that the load is lowered safely into the hold.

Q. That is, he steps over to the rail of the ship, and sees that the sling is properly hooked on to the load on the dock?

A. Yes.

Q. And then he gives a signal to the winch driver to lift it?

A. Yes.

Q. And then the load is swung over the rail?

A. Yes.

Q. Then he looks down the hatch to see if everything is clear and shouts out?

A. Yes.

Q. What is the shout he gives?

A. Generally "Look out below."

Q. And then the load is lowered into the hatch?

A. Yes.

Q. I believe you said he did not shout out for the load that hit Havery?

A. He did not shout at that time.

Q. Now, had he shouted out on the load that came before that morning?

A. Yes, I had heard him shout.

Q. How far is it, as near as you can remember, approximately, from the Sampson post over to the hatch combing?

A. Oh, it might be ten feet; from seven to ten feet.

Q. Where are the winches located?

A. The winches are in front of the two Sampson posts, in the center, or immediately behind the fore end of the hatch combing.

[fol. 150] Q. Could the winch driver attend to his engine, and at the same time, see down into all parts of the hatch below?

Mr. Carey: I object to that, your Honor, on the ground, and for the reason, that so far it has not been shown that this witness is competent to testify as to what the winch driver could or could not see. He says himself, that he was down in the hold; and there is no pretense that he was in the position the winch driver was in; and hence he is not qualified to testify to what the winch driver could or could not see.

Mr. Horner: I will ask him another question.

Q. Are you acquainted with the Andrea Luchenbach, and this winch and hatch in particular?

A. Yes.

The Court: Very well, he may answer the question.

Q. All right, now answer the question.

A. Repeat the question.

Mr. Horner: Will you please read the question.

(Question read.)

A. No.

Q. Now, why?

A. He could not see immediately under him, for one reason; the decks project out under his feet to some distance; and there was three decks underneath him; and that would stop his vision from seeing there; and then, the angle at the side, on each side, he could not see on account of the angle in there.

Q. Just take now, and illustrate that with your pencil?

A. (Illustrating.) Well, in here, for instance, and in here, (pointing at portions of the diagram), these are the decks [fol. 151] under his feet, and he is standing here; and these decks come across there, and he could not see there. You can assume there, if they are there, you could not see underneath these, because that projects out at the bottom just as far as they do at the top; and that at a certain angle he could not see on the side; and that would obstruct his view there and there (indicating). He could see little of the forward end. He could see the aft end.

Q. If he were located right there (indicating) he could not see the men down here (indicating)?

A. No.

Q. And he could not probably see the men out that far, (indicating) unless he leaned over the hatch combing?

A. If he leaned over the hatch combing, he could see them there.

Q. Oh, yes, he could probably see any of them if he could lean out far enough there?

A. If he leaned out far enough, he could see underneath his feet; but he is not going to be able to handle his winch and do that.

Q. Can he stay at his winch and at the same time see the men located at different points around in the lower hatch?

A. No.

Q. Mr. Cameron, what are the duties of a hatch tender?

A. To see that the loads are taken up from the dock safely, and put into the hold safely; to look after the men; to give signals to the winch driver in doing so; to look after the rigging up of the ship, and take off the hatches; in fact, to get ready for the work; and after he gets ready to go to work, do as I say.

[fol. 152] Q. When you are loading the lower deck, in the hold, does he go around the hatch and look out for the men in the lower hold?

A. He has to; he would not be able to see everywhere under these decks.

Q. Now, how does he tell, when he gives the signal to look out below, or whatever shout he does give, how does he tell whether the men hear him or not? Have they any way to return the signals, showing that they understand it?

A. The signal is for the winch driver to hear.

Q. How is that?

A. He is supposed to give the signal to the winch driver.

Q. Yes; but he shouts out, you say, to the men below, when he calls out, "look out below"?

A. Yes.

Q. How can he tell whether you hear him or not?

A. Why, naturally if a person don't hear it, and stayed in the same position, I presume, if they hear it, they naturally would move.

Q. He tells then by looking down the hatch whether they hear the signal by going over to a place of safety?

A. Yes.

Q. Under the deck?

A. Yes.

Q. Now, what wages were longshoremen receiving at that time?

A. Why, around one hundred and seventy five dollars.

Q. A month?

A. Yes.

Q. Now, how do you arrive at that? That would be approximately \$175.00 a month, approximately what they were making?

[fol. 153] Q. Now, how do you arrive at what they were getting?

A. They work different hours, long stretches, sometimes half a day and sometimes a day and a night.

Q. What wages were they getting an hour? How much in dollars and cents were they paying?

A. Eighty cents per hour for straight time for eight hours; and all over eight hours would be \$1.20.

Q. And it has been raised, I believe, since that time, there has been a raise?

A. Yes; there has been a raise.

Q. But at that time, they were making approximately, average earnings at that time would be \$175.00?

A. Yes, just about that.

Q. Sometimes, some were of course making more, and others less?

A. Yes.

Q. Now, just describe the position of Mr. Haverty, where he was, and how he was, when he was hit? Just take your own time about it, and tell it in your own way?

A. He was out there in the middle of the hatch, a little closer to the forward end of the hatch quite a bit, stopping over handling this load, putting away his load. I was on the inshore side putting away mine; and I had already stowed a bale, and turned around in his direction to take over another bale, and I was looking that way just in time to see the load hit him, it descended right on his back, and hit, and knocked him down.

Q. Illustrate to the jury,—just rise, and illustrate to the jury, as near as you can remember, the angle or position he was in when he was hit?

[fol. 154] A. (Illustrating and demonstrating) He was stooping over just like this; and had this position to lift.

Q. He had hold of this bale of wool?

A. Yes.

Q. Now, whereabouts in the back did the load hit him?

A. Just about what is called the small of the back; pretty well down.

Q. How quickly did these loads come down? Of course, it is very difficult to estimate it, but give the jury some idea, after the load is signalled to drop, how quick does it come down?

A. Well, 1600 pounds would drop enormously quick if a person did not use much judgment in dropping it.

Q. Assume that they are dropping them in the usual way they are dropped?

A. They are usually dropped pretty fast, because there is supposed to be no one in the way and they will drop a load down very fast until they get with a foot or two of the floor, of the bottom, and then they check them up.

Q. Does a winch driver get very expert in controlling the winch, and checking up loads?

A. Oh, yes, they are very good in dropping and checking them.

Q. They drop quick, do they?

A. Yes.

Q. They do not waste any time going down?



A. No sir.

Q. Now, then, what happened? What was done with Mr. Haverty after he was hit? And what was his position?

A. What was done to him?

[fol. 155] Q. Yes; I mean after he was hit?

A. Why, we picked him up, and put him on a board, boards which can be used for loading, and took him out of the hatch with the winch, and put him on a stretcher, and took him out to the ambulance.

Q. You say that the hatch tender gave no signal? Was there any signal at all given by anyone?

A. No sir.

Q. Of the approach of that load?

A. Well, I believe one of the boys did,—Mr. Hagey, he said something, he let a squak out of him.

Q. That is, when he saw it?

A. Yes.

Q. Just tell about that?

A. Just about the time that I turned around from putting away my bale, I turned around to reach for another bale, and I was facing the hatch, while the load was just about two or three feet above Mr. Haverty, when Haverty—Hagey, I mean, he shouted a warning to him; that is, a yell; he did not say anything, but a person would naturally holler out, look out, or high, or something like that; but he was not in time for him to get out of the way; he—it was coming down too fast.

Q. Can you illustrate with your pencil on that particular map there, about where Mr. Haverty was when he was hit in the hatch?

A. Yes; I think so. He was just about here (indicating); that is the line of the hatch; and he was out about there. (Indicating.)

Q. He was out in the open hatchway?

A. Yes.

[fol. 156] Q. Now, on this previous load that you were taking care of before Mr. Haverty was hit, where were the boys working?

A. In just about the same place; it might probably have been a little forward.

Q. I will ask you to come down here again. Now, show where you fellows were working just prior to the time that Mr. Haverty was hit?

A. We were stowing that stuff, well, back here, and in forward in this space here, aft of the hatch, and forward; and we started in around here, and moved back toward the aft end of the boat, just about the load previous? Is that what you want to know?

Q. Yes; where would you put that?

A. Well, we were almost in the same position as where he got hurt, a little bit further forward.

Q. Well, you were stowing it here, in these ends, and you had not begun to stow up the center yet?

A. No, we were coming up towards it.

Q. But you had not filled these ends here?

A. Yes; it was full right here; and we were working right up to

the center; and we finish in the center,—we were finishing up in the center when he got hit.

Q. Now, were you men that morning depending upon the hatch tender for warnings of the lowering of these loads?

A. Yes.

Q. Now, you say you put Mr. Haverty on a board there?

A. Yes.

Q. Did you remove any of his clothing?

A. After we got him on the dock, we looked at him.

Q. Just tell what you saw.

[fol. 157] A. I am not positive, but I believe I did look at him in the hold; but anyway, we saw the same thing up on the dock; there was a large discoloration, discolored pretty bad on his back there; and a portion of the skin was scratched off.

Q. Was he saying anything?

A. He was very quiet.

Q. How is that?

A. He was very quiet.

Q. Did he appear to be in any pain?

A. Oh yes; the perspiration was standing out on his face, and he looked kind of bad.

Mr. Horner: That is all.

Cross-examination.

By Mr. Carey:

Mr. Carey: Mr. Horner, it so happened that this boat was here on another trip yesterday; and we had photographs taken of it yesterday; and if you require it, I will introduce the men who took them. But, I want to examine this witness about these pictures now.

Mr. Horner: Yes.

By Mr. Carey:

Q. I do not suppose you happened to be on this ship when she was in port again here within the last week?

A. No sir, not within the last week, no.

Mr. Carey: We will show later on that she was, and these are photographs of her; and I would like to have these photographs marked for identification.

Mr. Horner: If you will state that these are photographs of the Andrea Luchenbach, we will admit it.

[fol. 158] Mr. Carey: Yes, they are.

Mr. Horner: Then it is so admitted.

Mr. Carey: Will you mark these exhibits; they are photographs of hatch No. 8.

Mr. Horner: Yes; they show only one side, however. But that is all right, we will admit they are photographs, so you will not need to call the photographer.

Photographs marked for identification Defendant's Exhibit 1 and 2.

Mr. Carey: These photographs have been marked defendant's exhibit 1 and defendant's exhibit 2.

The Clerk: Yes.

By Mr. Carey:

Q. Mr. Cameron, do you remember that on the Andrea Luchenbach, just about at hatch No. 8, there is a house there that goes up kind of high?

Mr. Litchman: Poop deck.

A. Yes; I believe there is, yes.

Q. For the purpose of the record, defendants exhibit 1 is a photograph taken on top of the poop deck, or the roof, there, with the camera pointed forward in such position that it takes the photograph of the man standing at the winch?

A. (Examining photograph.) Yes.

Q. Do you recognize this picture, showing the location of the winch with reference to the hatch?

A. Yes.

Q. That is about as you recall it, is it?

A. It looks to be considerably closer than it should have been. [fol. 159] That is the only difference I see.

Q. Now, photograph marked defendant's exhibit 2 is a photograph taken looking diagonally across the hatch opening in the direction of the position of the winch driver; do you recognize that?

A. I don't say as I recognize that, but I presume it is the hatch, possibly, could not be anything else, but it is closer to the hatch.

Mr. Carey: Mr. Horner admits it is, and we will show it is.

Mr. Horner: That is of the Andrea Luchenbach?

Mr. Carey: Oh yes, I was down there myself when it was taken. Perhaps, I had better let this jury see these photographs before asking any more questions.

(Photographs exhibited to the jury.)

Q. Mr. Carey: Defendant's exhibit 1 was taken by the photographer looking forward from the roof of the little house, and you can see the position of the winch driver here. Photograph No. 2 is taken with the photograph standing here, and the camera is directed diagonally across the hatch, to take a picture of the winch driver, or the man standing in the position of the winch driver. Now, while the jury is looking at those photographs, I will continue my examination of Mr. Cameron.

Q. Do you recall what booms were being used to load this ship at this time? Were they the two booms between the Sampson post which are on the inshore side of the ship?

A. No; I could not recall that.

Q. You don't remember what booms they were?  
[fol. 160] A. No.

Q. You do not know what booms they were?

A. No.

Q. Now, you do know, don't you, that one boom was swung out over the side of the ship?

A. Yes.

A. And another boom was swung so that the fall lines would go down from the top of the boom down through the hatch opening to the bottom of the ship?

A. Yes.

Q. That is correct, is it?

A. Yes.

Q. Now, you were one of the three men who were handling the loads on the inshore side?

A. Yes.

Q. And Mr. Haverty was one of the two men who were handling the loads as they came in on the opposite or offshore side.

A. Yes.

Q. Now, as I understand it, this boom that was swung over the hatch was stationary; that boom was stationary?

A. Yes.

Q. And a load would be let in and the inshore crew would take it and stow it away, is that correct?

A. If it was their turn, yes.

Q. Well, if it was their turn?

A. Yes.

Q. Then the next load would be left in just exactly in the same way, but the offshore crew would take it and stow it away?

A. Yes.

[fol. 161] Q. While they were doing that, there would be another load come in which would go to the other crew, and so on, alternately, until the work was completed? Is that the way the work was done?

A. Not while they were doing it, no.

Q. How is that?

A. Not while they were doing it; another load did not come in there until they had the other load put away.

Q. After they had the load put away they would get another loads; and those loads would be taken alternately, by the offshore and inshore crews on each side of the hatch?

A. Yes.

Q. So that the loads, as they came into the hatch, they landed in the same place down below, with regard to the center of the hatch, but without regard to which crew took them?

A. Yes; they were received in the same place.

Q. Yes?

A. But they had to be swung to different places.

Q. That is, a load would be drawn in over the side of the side to a point above the hatch and be let down?

A. Yes.

Q. Would be let down by the winch driver, and each load went down the same way, to the stopping point, without regard to which side it was going to be stowed on?

A. That is correct.

Q. The idea was, there should be but one load in the hold or being operated on in the hold at the same time; is that correct?

A. Each load should be put away on one side.

Q. Yes; before the next one came in?

[fol. 162] A. Yes.

Q. And if the winch driver put in a second load before the preceding load had been taken care of, why, then, he was doing something he should not have done?

A. If he put a load in, and brought it down over their heads, while they were working underneath, that is naturally something he should not have done.

Q. Something he should not have done?

A. Yes; it would be dangerous to the men underneath.

Q. But that is what you say did happen in this case?

A. Yes.

Q. Do you recall where the boom was, the top of the boom which was swinging over the hatch, was with reference to the center of the hatch?

A. It was closer to the forward end of the hatch; that is, pretty close to the forward end; pretty well tipped up, on an angle like this (demonstrating).

Q. Pretty near straight up and down?

A. Yes.

Q. Now, you had never operated as winch driver, had you?

A. No sir.

Q. And you had never taken the position of the winch driver on this particular ship?

A. Oh yes.

Q. Had you?

A. Oh yes.

Q. Now, every time a load was hauled in and started to descend, the winch driver could see that load as it went down, from the time it went forward until it came to a stop?

A. Yes; he could see it all the way down the hatch, he could see [fol. 163] it by reaching over or looking over; not standing in his position, but he had to reach over to see it.

Q. Referring then to the photograph which is marked defendant's exhibit 2, he could lean over the hatch combing and see right down from the time the load started at the top until it came to rest at the bottom of the hold?

A. Well, yes, assuming that he remained in that position that he had there, because that picture was taken when there was nothing doing.

Q. How is that?

A. That picture was taken when there was nothing doing. If the picture had been taken when a load was going down and stopped, he would have to lean over further than that picture shows to see.

Q. But he could see by leaning over?

A. Yes, by leaning over in that position, he could see down the center of the hatch.

Q. As I understand, you say, in operating this particular ship, the hatch tender would first stand at the rail to see that everything was properly fastened on the dock?

A. Yes.

Q. And then he would go over there, or is supposed to go over there, and look down into the hold?

A. Yes.

Q. But in this case he did not do that?

A. No sir.

Q. He stayed over at the rail; is that your idea?

A. Well, I could not say where he went that day. From down in the hold, I could not see him.

Q. But at any rate, he was not in the position you claim he should [fol. 164] have been?

A. He was not there when I looked up after the accident; he may have come afterwards, but he was not there then.

Q. But at the time the accident happened, or immediately preceding it, he was not where you claim he should have been?

A. No.

Q. And hence he must have been somewhere else, of course?

A. Yes.

Q. How does the man on deck know that the preceding load had been gotten out of the way?

A. The hatch tenders can look around over the hatch and see it himself.

Q. And if, in this instance, the hatch tender was not in a position where he could see whether or not the preceding load had been gotten out of the way, the winch man had no business letting down a new load until he had been given that information: is that correct?

Mr. Horner: Don't answer that, Mr. Cameron, until we object; we object to the drawing of the conclusion by counsel, he is attempting to intimate, and almost stating, on whom the responsibility or liability for any alleged negligence lies.

Mr. Carey: That is the entire purpose of the law suit; I have always understood it to be such.

The Court: What is the question?

(Question read.)

Mr. Horner: Now, my objection is, of course, I think the pleadings themselves set out our claim that it was the negligence of the [fol. 165] hatch tender in not being there when it was his duty to be there; but we contend that counsel has not the right to state to the jury, either in the form of a question, or in any other way, who is to blame for the negligence in the dropping of this wool. That should come from the court in his instructions.

Mr. Carey: Oh, no; that is exactly what your Honor cannot tell the jury.

Mr. Horner: He has no right to assume it was the winch driver's fault, and arbitrarily state whose fault it was that this man was hurt.

Mr. Litchman: I might add to the objection——

The Court: I will sustain the objection to that question we will adjourn at this time until two o'clock.

(Examination of witness suspended.)

And thereupon, the further hearing of said cause was continued to 2:00 P. M., May, 1924.

[fol. 166]

May 2, 1924—2:00 o'clock p. m.

Trial resumed. All parties present as noted.

WILLIAM CAMERON on the stand.

Mr. Carey: I think I am about through with him on cross examination. I do not think I have any more questions.

Mr. Horner: Are you through then.

Mr. Carey: Yes.

Redirect examination.

By Mr. Horner:

Q. Mr. Cameron, I will ask you to look at these photographs. Have you seen these?

A. Yes; I have seen them.

Q. I will ask you, if the winch driver there could operate these winches and at the same time look down the hatch and see everything down in there?

A. No.

Q. Not in that attitude he is in now, as shown in the picture?

A. No.

Q. These pictures do not show the hold, the lower hatch, or anything like that?

A. No; there is some freight on the upper deck.

Q. There is some freight lying on the upper deck?

A. Yes.

Q. How far is it, just estimate it, is it from the bottom of this top deck here, down to the bottom of the deck immediately underneath, as near as you can estimate it?

[fol. 167] A. From the main deck to the next deck?

Q. Yes.

A. Oh, probably ten or twelve feet.

Q. There is some lumber back in behind there, and that don't show the bottom of it, or the floor of it?

A. Yes; that is the end of it; it is a little bigger than the rest; there is some it don't go that far; it is the ends of the lumber.

Mr. Horner: That is all.

## Recross-examination.

By Mr. Carey:

Q. I may have asked you this before, I don't recall. But you have never worked as winch driver, have you?

A. No, sir.

Q. And you never stood in the position of the winch driver on this particular boat?

A. Yes.

Q. You did?

A. Yes.

Q. When?

A. Immediately after the accident.

Q. What were you doing there?

A. I went up there and looked down there to see how it could happen. It suggested itself to myself it was funny how it hit him like that; and I went up there and looked down there myself just naturally kind of thought of it, and I walked over there and looked down.

Q. Were you able to solve the difficulty in your own mind, as a result of that inspection?

A. No; I could not solve the difficulty. I guess that will have [fol. 168] to be solved here.

Q. What is that?

A. I presume that will have to be solved here.

Q. You reached no conclusion then as to what went wrong, or what was wrong?

Mr. Horner: We object to this. That is for the jury to draw the conclusions; let the witness state the facts.

Mr. Carey: He is drawing a conclusion about what the winch man could or could not see.

The Court: What was the question.

(Question read.)

The Court: I will sustain the objection.

(Witness excused.)

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FLOYD MATTHEWS, a witness on behalf of the plaintiff, was first duly sworn and testified as follows:

## Direct examination.

By Mr. Horner:

Q. State your full name?

A. Floyd Matthews.

Q. Where do you live?

A. I live at 1819 Terry Avenue.



Q. How long have you lived in Seattle?

A. Oh, I have made my home here ever since 1900.

Q. And what is your business?

A. I am a longshoreman.

[fol. 169] Q. Were you ever a winch driver?

A. I have drove a single winch; yes.

Q. Now, what is the difference between a single and a double winch?

A. Well, they drive two single winches here for a double winch. In any other port on the Coast, it is a two man job; but here they do it with one. Especially on the the East Coast, there is a single friction winch, I mean a double friction winch. I guess that is the only double winch there is. But here, they operate them with one man instead of two.

Q. How were you a winch driver?

A. Well, I have done it off and on; I haven't drove winch now for three or four years; but before that, I drove winch until I lost my eye, and I had to stop driving winch.

Q. Now, I will show you these pictures. I showed you these pictures just a minute ago, and I believe you examined them then?

A. Yes.

Q. Look at them again, and state whether a man could operate these winches and be in a position that man is there? I will put it this way: Could he operate the winches and see clear down into the hold of the vessel?

Mr. Carey: Now, just a minute; I object to that on the ground that it is not shown that this witness is at all familiar with this ship in question; and if anyone is to draw conclusion from these photographs, the jury can do that just as well as this witness can.

A. Well, I happen to work on this ship.

The Court: The objection will be sustained. You need not [fol. 170] answer the question.

Q. Where you familiar with the Andrea Luchenbach?

A. Yes; I have worked her several times.

Q. Are you familiar with hatch No. 8?

A. Yes; I have worked in No. 8 hatch.

Q. You have worked there?

A. Yes.

Q. You know where the winches are located?

A. Yes.

Q. And you know where this particular winch is?

A. Yes.

The Court: He may answer the question now.

Q. Now, I will ask the question again: Could he operate these winches and look over and see what is going on down in the hold?

A. Well, he could not do it and see. He could not see directly down, no sir.

Q. He could not see the bottom, could he?

A. No sir.

Q. Now, I will show you this picture. Have you looked at it thoroughly?

A. Yes.

Q. I want to get it clear, now, so the jury can see. From where was that picture taken?

A. That was taken from the top of the crew's quarters, a small place built where the crew sleeps. It is on the poop deck.

Q. In other words, it is up above the hatch?

A. It is about nine feet or so high taken from the top of that.

Q. Now, could you see, from right behind that man, could you see another man operating the winch on the next hatch, right [fol. 170½] there?

A. Yes.

Q. Is that the attitude he would usually take?

A. No; they don't take that attitude when they drive winch.

Mr. Carey: What is that?

Mr. Horner: Right there? (Indicating on photograph 2.)

Mr. Carey: That man?

The Witness: He is not driving winch.

Mr. Carey: He is not driving a winch.

Mr. Horner: Yes, right there at the rail.

Mr. Carey: No; there is no winch being operated at that time. That picture was taken during the noon hour when there was nothing doing.

Q. Now, that is supposed to be the No. 8 hatch?

A. Yes.

Q. Mr. Matthews, could a man operate winch effectively and also at the same time efficiently see down there, and see what is going on in the hold of the vessel?

A. Well, there is cases where he can do it, yes.

Q. Could he do it with the Andrea Luchenbach?

A. I don't,—no sir.

Q. Mr. Matthews, what are the duties of the hatch tender?

A. The duties of hatch tender is to trim the gear, and tell the winch driver when to bring in the load, and look after the safety of the men.

Q. Now, what do you mean by the men?

A. The men in the hold, or on the deck, provided there is no foreman over him. Lots of companies have a hatch boss over the winch driver.

Q. When a load is being lowered into the lower hold, what is [fol. 171] his duty as to the men down there in the hold?

A. Well, he tells them to look out below.

Q. You have worked there, but you were not there on the ship at that time?

A. I was not there at the time of this accident; but I worked on that ship the day before.

Mr. Horner: That is all.

## Cross-examination.

By Mr. Carey:

Q. You say you drove winch at hatch No. 8 before?

A. I never said I drove a winch at hatch No. 8 on that ship.

Q. I misunderstood you then. I thought you said you did?

A. No; I said I worked in that hatch, in the hold of that hatch.

Q. But you never drove winch?

A. No, but I have trimmed gear.

Q. Well, let us not get too enthusiastic. Anyway, you never drove winch at hatch No. 8?

A. No.

Q. So that whatever work you did in hatch No. 8 was done in the hold, and in the same position that Mr. Haverty was in when he was hit?

A. Well, not entirely, no sir. I have took off them hatches there several times; and I have been in the position of the winch driver when we took off the hatches.

Q. But you never were in the position of the winch driver, lowering or raising those?

A. No sir; not on that particular ship.

Q. Now, you said on some ships the winch driver when driving [fol. 172] his winch and letting loads down, can see down into the hold?

A. Yes; on some ships you can; and on some ships you cannot—

Q. Now, just a minute. On some other ships, you say, while the winch driver is driving winch, he cannot see down into the hold very far?

A. It all depends upon what part of the hold it is in. If he is working the forward end, he can see down; but if he is working the aft end, whichever end the winch is on, he cannot see down.

Q. Now, in what position, must the winch and the winch driver be, in order that he can see down into the hold?

A. Why, the winch, if the winch would be set behind the hatch close enough to work between decks he can see down the hold.

Q. If the winch is setting there immediately forward or immediately after the hatch, leaving just room enough for a man to stand, and enough room to work, he can then see down in the hold, can't he?

A. It all depends upon what deck they are working on; it makes a difference how the ship is built.

Q. Well, I am now talking about the Andrea Luchenbach?

A. Well.

Q. Do I understand you to claim that that ship was so built and the winch on No. 8 hatch was so placed that the winch man when operating the winch could not see down into that hatch?

A. You could not see directly down, not straight down, no.

Q. That is, his line of vision would be on an angle?

[fol. 173] A. On an angle, yes.

Q. Although it is on an angle, he could see away down to the bottom of the ship?

A. Oh, he could not see directly down.

Q. I understand that; you have already stated that. I do not admit that your statement is correct, but I understand you have already stated that he cannot see directly down?

A. No sir.

Q. But his line of vision would be diagonal?

A. On an angle.

Q. But if the hatch is sufficiently wide, although his line of vision is on an angle, he can see down to the bottom of the ship, can't he?

A. Yes; on an angle, he can.

Q. So when a load is being lowered from a boom that hangs out over approximately the middle of the hatch, or a little forward of the middle of the hatch, he can see that load from the time it starts down until it gets approximately to the bottom of the ship?

A. That is, forward, past the middle; yes.

Q. Yes?

A. On the forward end.

Mr. Carey: That is all.

(Witness excused.)

[fol. 174] ARTHUR MOWHE, a witness on behalf of plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Horner:

Q. Mr. Mowhe, where do you live?

A. 1523 W. 62nd St.

Q. What is your first name?

A. Arthur.

Q. M-o-w?

A. H-e.

Q. How long have you lived in Seattle.

A. About 17 years.

Q. What is your business?

A. Longshoring.

Q. How long have you been longshoring?

A. About seven years.

Q. What particular feature of the work, if any, do you specialize in?

A. In the hold.

Q. Where were you on May 21st, 1923?

A. Working on the Luchenbach ship.

Q. The Andrea Luchenbach.

A. Yes.

Q. That is the ship mentioned in this case?

A. Yes.

Q. What time did you go to work?

A. Eight o'clock in the morning.

Q. Now, just state what occurred there?

A. Do you mean in regard to this accident?

Q. Yes?

[fol. 175] A. Well, the only thing I saw of the accident was after the load had hit him, and he was laying on the floor; and we picked him up, and took him out on a board sling, and put him on a stretcher, and the ambulance took him away.

Q. Were you working with him?

A. No sir.

Q. Where were you working?

A. I was on the inshore side.

Q. You were on the inshore side, but you were in the same hatch?

A. The same hatch.

Q. Who was working with you?

A. Cameron and Oliver.

Q. Who was working with Mr. Haverty?

A. McGinn, and Mr. Hagey.

Q. How far away were you? As I understand it, you and your companions were stowing a load on one side of the boat, and they were stowing a load on the other side of the boat; is that correct?

A. Yes.

Q. How far apart were you from Mr. Haverty and his companions?

A. I should judge about twenty feet.

Q. You were both getting your wool from the same hatch and the same sling?

A. Yes.

Q. Who was the hatch tender that day?

A. Mr. Lee Carles.

Q. Did you hear any warning, or receive any signal, from him, of the lowering of this load?

A. Not of that load.

Q. Had you received signals from him on all previous loads which [fol. 176] had come down?

A. Yes.

Q. How many loads had come down before the one came down and hit Mr. Haverty?

A. Oh, I should judge between fifteen and twenty loads.

Q. And they were wool, I believe?

A. Yes.

Q. How much did these loads of wool weigh approximately?

A. About 400 pounds.

Q. 400 pounds to the bale?

A. Yes.

Q. And how many bales in each sling load?

A. Four.

Q. Then it would be something like 1,600 pounds?

A. Yes.

Q. How rapidly does the load drop when they let loose?

A. It comes down pretty fast sometimes.

Q. Do you know the position that Mr. Haverty was in when he was hit?

A. No; I don't know the position that he was in; but I was told he was in a stooping position.

Q. How far away from him were you when he was hit?

A. About twenty feet.

Q. Where was he in the hatch when he was hit?

A. In the square.

Q. In the square?

A. In the forward part.

Q. Do you know what he was doing?

A. Lifting on a bale of wool.

Q. Mr. McGinn and Mr. Hagey were with him?

[fol. 177] A. Yes.

Q. You are sure there was no signals given of the lowering of that load?

A. I did not hear any.

Q. Mr. Mowhe, what is the duty of the hatch tender?

A. The duties of a hatch tender is to take off the hatches and to trim his gear, and after that is done, why, he sees that the loads are hooked on properly on the dock, and gives signals from the deck into the hatch to lower.

Q. Gives his signals to whom?

A. To the winch driver.

Q. Then when he gives the signals to the winch driver, you mean the first signal is to raise it from the dock?

A. Yes; to raise it from the dock.

Q. And then he brings it over to the hatch?

A. Yes.

Q. And then he stops?

A. Yes, if everything is not clear below.

Q. Then he looks below to see if it is all clear?

A. Yes; and then he hollers out "look out below."

Q. And then he signals the winch driver to come back?

A. Come back with the load and lower it into the hold.

Q. Lower it into the hold?

A. Yes.

Q. You say that one of his duties is to clear the gear? Or what did you say? Clear the tackle? What was that term that you used, mention it again?

A. Trim the gear.

Q. What is that?

A. Well, that is to regulate his booms, swing the boom out on [fol. 178] the deck, so he can lift the cargo off the dock; fix the other boom so he can lower the boom into the square of the hatch, raise it or lower it, whichever end his men are working on.

Q. What wages did you men receive at that time? What wages were longshoremen such as you and Mr. Haverty earning at that time?

A. 80 cents an hour for straight time; and \$1.20 an hour for overtime.

Q. I believe that since then, wages have been increased somewhat?

A. Yes, they have.

Q. On the basis of wages at that time, and the hours of work at that time, how much did you get a month?

A. Around one hundred and seventy to one hundred and seventy five dollars, I should judge.

Q. Now, Mr. Mowhe, have you seen these pictures, defendants' exhibit 1 and 2?

A. I have.

Q. Take this picture No. 1, defendant's exhibit No. 1, I will ask you if the winch driver is in the position of the man shown in that picture, could he operate the winches and at the same time see down into the hold?

A. No sir, he could not.

Mr. Carey: Just a minute. I move to strike that answer, your Honor. The witness answered it before I could possibly object.

The Court: Well, he has shown knowledge of where the winches are located, has he?

Q. Are you familiar with the Andrea Luchenbach?

[fol. 179] A. Yes, I am.

Q. How long have you worked on it?

A. We had worked on her at that time the fourth day.

Q. Are you familiar with the location of the winches and the hatch?

A. Yes.

The Court: He may answer the question.

Q. And the winches upon hatch No. 8, where you were working?

A. Yes.

Q. All right, answer the question. Could the winch driver operating the winches in the position that he is there, and at the same time see down and keep a look out on the hold below?

A. No sir; he is not stooping over far enough to suit me.

Q. Just step down here in front of the jury. (Witness does.) Now, suppose a man is working back in under here, can the winch driver see back in there? (indicating on diagram).

A. No sir.

Q. Now, if he is working back in there (indicating) on one of the lower decks, how does the hatch tender find out whether everything is safe or where he is?

A. By going to the hatch and looking down in there.

Q. He will come over here? (indicating).

A. Yes.

Q. A hatch tender will come over here?

A. Yes.

Q. And look down to see where they are?

A. Yes.

Q. And then he gives his warning to the men?

A. Yes.

[fol. 180] Q. And then the load is lowered?

A. Yes.

Q. Now, after Mr. Haverly was injured I think you said he was put on a stretcher, or in some way took care of him?

A. We put him on a board sling to take him out of the hold; and then we put him on the stretcher afterwards and carried him down to the end of the dock to the ambulance.

Q. Did you examine him physically, or take off his clothes?

A. No; all I seen was just his back.

Q. What did his back show?

A. Why, it just showed where a lot of skin was all tore loose, and a big red blotch.

Q. Was he apparently in pain?

A. Why, he seemed to be at the time, yes.

Mf. Horner: That is all.

Cross-examination.

By Mr. Carey:

Q. You say you heard the signals given to the men below when the previous load came in?

A. Yes.

Q. Who gave those signals?

A. That I don't know, who gave those signals.

Q. Now, who does give the signals?

A. The hatch tender.

Q. Does the winch driver sometimes sing out to the men below?

A. No.

Q. You never knew of that occurring?

A. I heard him, yes.

Q. And he was doing that in this particular case, was he?

[fol. 181] A. I could not say.

Q. Will you swear it was not the winch driver on these previous fifteen loads that in fact warned the men below of the fact that the load was coming down?

A. Did you say hatch tender.

Q. No; winch driver.

A. Well, I am pretty hard of hearing myself; and I could not swear just who it was who was giving the signals.

Q. It may have been the winch driver that gave the signals?

A. It may have been, for all I know.

Q. Now, where was the hatch tender at the time this particular load was going down?

A. That I don't know.

Q. You don't know whether he was at the hatch combing or not?

A. No sir.

Q. Or whether he was over at the rail?

A. No sir.



Q. Of course, if he was over at the rail, you don't know what he was doing over there, or why he was over there?

A. No.

Q. You mentioned about the square of the hatch. I don't know whether that has been made particularly clear yet. What do you mean by "the square of the hatch"?

A. That is the hold, the square.

Q. That is, when you speak of the square of the hatch, you mean down on the lower deck?

A. All of the way down through there.

Q. You mean the space directly beneath the opening of the hatch, on the upper deck; is that it?

A. Yes.

[fol. 182] Q. In other words, there is approximately a square hole in the upper deck, that is twenty four feet in one direction and twenty one feet in the other on this top deck; and the square of the hatch on each deck is the space directly underneath that hole?

A. Yes.

Q. And that is where you mean when you speak of the square of the hatch on the lower deck?

A. Yes.

Mr. Carey: That is all.

Redirect examination.

By Mr. Horner:

Q. Now, just immediately preceding this load coming down, where had you been working?

A. I was stowing away our load.

Q. At which end?

A. In the forward end.

Q. That would be this end here (indicating on diagram).

A. Yes.

Q. That is the propellor end of the vessel, and this is the forward end?

A. Yes.

Q. And you were working up in this end?

A. Yes.

Q. And then where was the hatch tender, where would he have to be in order to see you?

A. Up there (indicating).

Q. He would have to be on this end? (Indicating.)

A. Yes.

[fol. 183] Q. Could anyone over here where the winches are have seen you where you were working?

A. Well, I don't—no.

## Recross-examination.

By Mr. Carey:

Q. Now, you don't know—will you undertake to tell this jury that this winch driver, standing in the position where he would stand on this Luchenbach vessel, cannot see the men down in the square of the hatch in the lower deck?

A. Not and keep control of his levers.

Q. Have you ever operated as a winch driver?

A. No sir, I have not.

Q. Have you ever stood in the position of this winch driver?

A. Yes, I did.

Q. When?

A. After the accident.

Q. What was your purpose in going over there?

A. To see if the winch driver could see.

Q. And you discovered then that Haverty was hurt because the winch driver lowered the load when he should not have done so; is that it?

Mr. Litchman: Just a minute.

Mr. Carey: How is that.

Mr. Horner: We object to that question.

The Court: I did not catch the question.

(Question read.)

The Court: I will sustain the objection.

Mr. Carey: Exception. That is all.

(Witness excused.)

[fol. 184] Mrs. HAVERTY, a witness on behalf of defendant, being first duly sworn, testified as follows:

## Direct examination.

Mr. Horner: I want to state to the jury, that she is very hard of hearing, and I will have to talk very loud to her.

Q. Where do you live, Mrs. Haverty?

A. 532 Bellevue Ave. N.

Q. What is your business?

A. Well, I am keeping house for the children.

Q. What relation, if any, are you to the plaintiff Richard Haverty?

A. I am his mother.

Q. You are acquainted, of course, with what occurred last May?

A. Yes.

Q. On the 21st day of last May?

A. Yes.

Q. How long after it occurred did you see your son?

A. Well, I was down town at the time when he was hurt, and there was two men came over to the house to let me know right away; and I went right over as soon as I got home and heard about it, and I went right back up to the hospital, went right to the hospital from home, as soon as I could hear of it.

Q. Now, did you examine him to see what his condition was?

A. No, I did not, until I had a chance.

Q. Just tell what it was?

A. Well, it was—his whole back was just black and blue; just as black and blue as it could be.

Q. Did you see it some days after that? Did you continue to see [fol. 185] him?

A. Yes, indeed I did.

Q. How long was he at the hospital?

A. Three weeks.

Q. What was his condition?

A. Well, it was pretty bad.

Q. Now, how long was it until he was able to go to work?

A. Well, it was a long time, because he complained a great deal about his back, both day time and at night.

Q. Do you know whether he suffered any?

A. I do that. I do that.

Q. What was the nature of his suffering, if you know?

A. Well, oh, it is all kinds of suffering; and he just keeps going, and he walks the floor.

Q. What was the condition of his health before he was hurt?

A. It was good.

Q. What was it afterwards?

A. It was bad.

Q. Where is Mr. Haverty, the father of the boy?

A. No sir.

Q. Where is he, I say?

A. He has been dead for eighteen years.

Q. Are your other children here?

A. Well, there are two girls—

Mr. Carey: Now, just a minute. I think that has gone far enough.

The Court: I do not see how that is material, Mr. Horner.

Mr. Horner: I was attempting to show why we could not produce [fol. 186] the other members of the family to show the condition he was in.

The Court: Well, I will sustain the objection.

Mr. Horner: That is all.

Mr. Carey: That is all.

(Witness excused.)

CARL HAGEY, a witness on behalf of plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Horner:

Q. Where do you live?

A. 903 E. Thomas.

Q. What is your first name?

A. Carl.

Q. How long have you lived in Seattle?

A. I have made Seattle my home around ten years.

Q. What is your business?

A. Longshoreman.

Q. How long have you been a longshoreman?

A. Well, ever since I have been in Seattle. That is, I was away for about eighteen months in the army, and I did not longshore then.

Q. How many years did you say you had been in the business?

A. Well, make it about eight and one half longshoring; since I have been in Seattle, all of the time.

Q. Where were you on or about the 21st day of May, 1923?

A. I was working on the Luchenbach boat.

Q. The Andrea Luchenbach?

[fol. 187] A. Yes.

Q. That is the boat mentioned in this case?

A. Yes.

Q. At what hatch were you working?

A. I was in the aft hatch.

Q. What was the number of it?

A. I am pretty sure it was No. 8; but I couldn't say positive.

Q. Who else was with you there working?

A. Mr. Haverty, and a fellow named McGinn, Phil McGinn.

Q. Well, you were working there in a bunch?

A. In a bunch, yes.

Q. Where he was hurt?

A. Yes.

Q. Now, which group were you working with? The one that Haverty was in, or the other bunch?

A. I was with Haverty; and the other three men were over on the other side working.

Q. You were with Mr. Haverty?

A. Yes; Mr. Haverty and Mr. McGinn.

Q. Mr. Haverty and Mr. McGinn and yourself were taking care of the one side of the hatch?

A. Of our load, yes.

Q. How far away were you from the other bunch of fellows working on the other side of the hatch?

A. Well, the way we work, we were not right there in the middle of the boat; one side worked one side, and the other side worked the other side. They were over on their side and we were over on our

side, working; but I could not say just how many feet it was, from where Mr. Cameron and the others were working, I could not say [fol. 188] just how far it was over there where they were at the time of the accident.

Q. Now, who was the hatch tender?

A. Mr. Lee Carles.

Q. I believe you were present there when Mr. Hagey was hurt?

A. Mr. Haverty you mean?

Q. Yes?

A. I was.

Q. Did you see it?

A. Yes.

Q. Just state, did you receive any signal or warning of the lowering of this load?

A. No sir; we did not.

Q. Are you sure of that?

A. Sure, yes.

Q. Now, how many loads had been loaded—how many loads had been lowered down before this one that hit Haverty was lowered?

A. That morning, do you mean?

Q. Yes; that morning; just before this occurred?

A. Well, I could not say, but we had been working somewhere around forty five minutes or an hour; something like that.

Q. Do you know or could you approximate—there had been a number of loads put down anyway, had there?

A. Yes, sure.

Q. Now, had you received signals or warnings, or singing out, as you fellows call it, of the previous loads that had come down?

A. Yes; we had.

Q. Who gave you those warnings?

A. Well, the hatch tender; that is his job to give us warning [fol. 189] Q. And that was Mr. Lee Carles?

A. Lee Carles.

Q. Was Lee Carles the man who gave the signals?

A. Well, yes; I saw him give a lot of signals; but I could not say that he sung out all of the time.

Q. He was there that morning?

A. He was there that morning, yes.

Q. Had he given out, do you know of your own personal knowledge, that he had given out some signals before Mr. Haverty was hurt?

A. Yes.

Q. You are sure he gave out some signals?

A. Yes.

Q. Now, you are sure he did not signal for the load that hit Mr. Haverty?

A. Yes, I am positive.

Q. Was there any signal at all given by anybody of the lowering of this load?

A. I did not hear any signal until I seen the load, and I hollered myself, but the load had practically hit him as I hollered.

Q. How far was it from him when you yelled?

A. Well, I should judge it was about that far from him (indicating.)

Q. How rapidly do these loads come down into the hatch when they are let loose by the hatch tender?

A. They come down sometimes pretty fast.

Q. Just show the jury now, approximately, the position Mr. Hagey was in?

A. Mr. Haverty, you mean?

[fol. 190] Q. Yes, Mr. Haverty?

A. He was bending over something like that, lifting on a bale, and McGinn was kind of on the other hand. I don't know whether they intended to roll it over or drag it; I am not sure; but I think they were intending to roll it over that way. I was just out from under the hatch combing; I had hold of another bale, and was bending over trying to roll that bale back further, and I was facing Mr. Haverty. I was bending over this way facing him, and he was standing this way. (indicating). Well, I see that load coming down about that far from him. Well, I let a yell out of me, and the winch driver jerked the levers over, and it hit him, and it went up; it did not smash him down on the ground; it knocked him down, hit him and knocked him down, and he jerked his lever over when I hollered, jerked the lever over, and started up, and the load shot up in the air right up in the hatch.

Q. Now, what was Mr. Haverty's condition immediately after that? What did you do?

A. Well, I grabbed him, I run right over and grabbed him right away, and helped him.

Q. Did you on that occasion see his back?

A. Yes; we looked at it right there.

Q. Did you lift up his shirt?

A. Yes.

Q. And saw the bare back?

A. Yes.

Q. What did you see?

A. Well, the back, the skin was all pulled off, and bruised, and his back was bruised that far down.

Q. What wages were you fellows earning at that time?

[fol. 191] A. We were earning 80 cents an hour straight time and \$1.20 for over time.

Q. How much could a man working ordinarily make a month?

A. Well, I should judge around One Hundred and seventy dollars or so; something like that. Some months you would make a great deal more; and some months you might not make quite so much; but you would make around one hundred and seventy I should judge.

Q. What are the duties of hatch tender?

A. Well, they go on the ship, they find out what place they are going to work, and they go and rig up the ship, rig up the booms, and the guys, and they lower and put the boom out over the dock, or if they are working out of a scow, they swing the other over the

scow, and put one amidships or a little over to one side, so they can fetch in the loads from either side of the boat they are working on; it all depends. If they work on a dock, or off a dock.

Q. Now, what does he do, when you are taking loads off the dock, and putting them into the hold of the vessel, what is his duties then?

A. He sees that the load is hooked on the hook, so that the hook don't hit anybody in the head when they fetch the load out there and stop it; and he gives signals to the winch driver after the load is hitched on to the hook, he gives a signal to haul in the load, and if anything falls out of it, he stops it, as they straighten up the sling; and then he takes it in over the rail, and sees things are all right in the hold before he drops the load down.

Q. Now, does he give signals or warnings?

A. Yes.

[fol. 192] Q. What?

A. They generally sing out, if you are working in the hold, they generally sing out "look out below," or let you know they are coming in with a load; "stand clear," or "look out below" or some such thing.

Q. Assuming that he has hooked on to the load on the dock, state what signals are given until the load—what signals or warnings are given until the load is landed in the hold of the vessel?

A. Well, first, he gives them the signals to go ahead up off the dock.

Q. How does he give that signal? To whom does he give that signal?

A. To the winch driver.

Q. Then what does the winch driver do?

A. The winch driver goes ahead.

Q. What do you mean by going ahead?

A. He goes ahead on one winch and gets the load up even with the rail, and over the rail, so that when he goes ahead on the other winch, he won't hit the side of the ship, or the rail; he has to get it higher than the rail of the ship to take it over the rail, or over the edge of the ship; that is, he takes it over there, and the hatch tender then walks over to the hatch, and sees it is all clear, before going down in the hold, and then he gives the winch driver a signal to lower the load down into the hold.

Q. What signals does he give the man or men in the hold?

A. He sings out, "looked out below," or hollers at the men.

Q. Then when he sings that out, the winch driver releases the load?

[fol. 193] A. Yes; he comes in slow, if it is clear below.

Q. If it is clear below?

A. Yes.

Q. What position does the hatch tender take around the hatch to examine and see if the hold is clear and the men are safe?

A. Well, if you are working in one end of the hatch, the hatch tender is generally on the other end, where he can see the position of the men.

Q. That is to say, if you were working in this end of the vessel, where I indicate here (indicating on diagram), he would locate himself over here (indicating)?

A. Yes, he would locate himself where he could see the boys, and get a clear view of the men below.

Q. And then if you were working here, he would come around on this side and look down?

A. Yes.

Q. Now, just prior, or two or three loads prior to the time that Mr. Haverty was struck, where had you been working? Where had you and he been working?

A. We had stowed some bales right in below the winch driver, I should judge we were out there two bale lengths, or a little further than that.

Q. I will ask you to step over here to this map. I think you could tell us more quickly by stepping over here. Now, just take a position so the jury can see this map.

A. Do you want me to show you—

Q. This represents a ship. Look at that?

A. This is the square of the hatch; that is what we call the square of the hatch. That is what we call the square of the hatch; that is all open. That is where the loads come in. Well, we had been work- [fol. 194] ing right out in the square of the hatch, and we were running in and out of the side of the ship; starting out in the middle, and worked out in that manner, and we had just started out in there, may be we had two or three bales right in the square of the hatch; and I was just in under this part here; I was not standing right straight out there myself, but Mr. Haverty was; and Mr. McGinn was a little further towards me; and Mr. Haverty was a little further out.

Q. And the other bosses were working on this end here?

A. They were working on this side; this side here; they would not be there; we would be on that side.

Q. Over this way?

A. Yes.

Q. Now, in what position, or where, was the hatch tender, where would he have had to have been to have seen where you were?

A. Well, the hatch tender to see where we were would have to be over on this corner.

Q. And he could'n't have seen you where you were, if you had been over here where the winches were?

A. Well, no; he could not see if he was right where the winches was; he would have to step up close to the hatch combing to see straight down, he would have to be straight up against the hatch combing to see straight down; and he could not see standing over there driving the winches, and see straight down unless he got over that way (indicating).

Q. Just like looking down any other hole?

A. Yes; if you just walk up there and look straight down, you could see. But if he was standing back this way, he would have to



[fol. 195] lean over; and it is quite a ways down there; you would have to be there to get near the edge to see clear down.

Q. Now, you saw these two pictures here, I believe; you have seen them all, have you?

A. No sir; I have not seen them.

Q. Examine them now? These are pictures of No. 8 hatch; a portion of No. 8 hatch on the Andrea Luchenbach.

A. (Witness takes and examines pictures.)

Q. Now, in that position, (indicating), the winch driver have handled his winches, and at the same time see where you and Hagey were working?

A. He could not unless he leaned away over, the hatch combing and looked straight back—straight down at us.

Q. Could he have manipulated his winches, and done that?

A. Well, not very good, no.

Cross-examination.

By Mr. Carey:

Q. Did you ever operate the winches on that ship yourself?

A. No sir, not on that ship.

Q. Did you ever operate any winch?

A. Yes.

Q. You say that you had received warnings of the previous loads that had been put into the hold by the winch man?

A. I cannot say by the winch man, no, sir; but someone sang out. I would not say whether it was the winch man; it was supposed to be the hatch tender.

Q. Do you know whether or not it was always the hatch tender; or whether part of the time it was the hatch tender and part of the [fol. 196] time it was the winch man?

A. Well, I cannot say whether I do or not; or I cannot see the winch driver from straight down myself.

Q. Didn't you know those men intimately?

A. Well, I know them, yes; but sometimes they will holler out, "look out below"; and naturally we would get out of the way; but you would not see who it was.

Q. Could you tell who it was who called?

A. I would just get out of the way, whenever I hear anyone holler "look out below", I am getting out of the way.

Q. Isn't it a fact that it is the usual practice on these ships, in cases where the hatch tender is in a position to call out, that either the hatch tender or the winch man call out, dependant upon who happened to be in the best position for the instant?

Mr. Horner: Now, we object to that—

A. (Interrupting.) No sir.

Mr. Horner (continuing): That involves a law question, which is for the court to decide.

Mr. Carey: Why, no, Mr. Horner; that is just along the line of the testimony as to who it is that does a certain thing on the deck of the boat.

The Court: Objection sustained.

Mr. Carey: We will offer to show, on the cross examination of this witness, that as the work was actually conducted on this ship, the duty of calling out, if there was any such duty to call out, was not confined exclusively to the hatch tender, but it was done by either the hatch tender or the winch man, depending upon their position at the particular instant.

[fol. 197] The Court: Of course, you have not filed an answer yet, and I do not know what you are claiming in your answer; but your question would not tend to prove that, by any view. It is not what the common practice is; but what actually occurred on this ship; and what was done on this ship.

Mr. Carey: Well, that is what I was directing my question to, what they did. This witness testified that some fifteen previous loads went down into the hold.

The Court: I do not so understand. Will you read the question again.

(Question read.)

Mr. Carey: I am mistaken.

Q. Is it not a fact, that during the forty minutes or so prior to the accident, that as the previous loads were being loaded into the ship, the singing out was done by the winch man as well as by the hatch tender?

A. No; I cannot say it was.

Q. Will you say it was not?

A. I won't say it was not, no sir.

Mr. Horner: Just wait. Your Honor, I want it understood that I am objecting to that.

The Court: Well, you ought to make your objection. I did not so understand that there was any objection until you spoke.

Mr. Horner: Yes, I object.

The Court: On what ground.

Mr. Horner: It was the duty, under the law, they—the hatch tender was there, they had a hatch tender there, and he did not [fol. 198] appear to give the signals; and as a result this man was hurt. Now, they cannot escape liability by saying it was the duty of the winch driver to give the signals. That is our contention.

Mr. Carey: Well, yes, that is your contention.

Mr. Horner: That is the law.

Mr. Carey: That is not the law; at least, it is not our contemplation of the law.

The Court: Would it make any difference who it was, if there was someone gave a warning, and he did not hear it, whether it was the hatch tender or the winch driver, would it make any difference who was remiss in the performance of his duties, so long as it was established there was no warning.

Mr. Carey: I think in the ultimate analysis it will not make any difference; but I rather anticipate that, from Mr. Horner's remark, that he is going to show there is some distinction between the hatch tender and the winch driver.

The Court: Well, he may answer the question, because you have gone into the entire facts of what happened there when at least ten or fifteen loads had been lowered into the hold; and it may go to a question of the credibility of the witness, or something of that kind. He may answer the question.

The Carey: I think he has already answered the question.

(Record read.)

The Court: It may remain in the record.

Mr. Carey: That is all.

[fol. 199] Mr. Horner: That is all.

(Witness excused.)

Dr. JOSEPH LANE, a witness called on behalf of plaintiff, being first duly sworn, testified as follows:

Mr. Horner: Do you admit the doctor's qualifications?

Mr. Carey: Yes.

Mr. Horner: It is admitted that the Doctor is a well qualified physician and surgeon?

Mr. Carey: Yes.

Direct examination.

By Mr. Horner:

Q. What is your full name?

A. Joseph Lane.

Q. You are a practicing physician in this city?

A. I am.

Q. How long have you been here?

A. About fourteen years.

Q. Now, are you acquainted with the plaintiff in this case, Mr. R. Haverly?

A. I am.

Q. Have you seen and examined him and treated him at any time since May 21st, 1923?

A. I have.

Q. Just state for what you have treated him, and his present condition?

A. Well, I saw him about the first week in June in connection [fol. 200] with an accident or injury received to his back. At that time the condition apparently had improved; he had been under treatment before. At the time of the examination I found a large mass, about—oh, a little below the middle of the spine, it was swollen, very tender, discolored, and on the least motion, extreme pain; he

was not able to take any kind of ordinary exercises; I tried to have him go through them; on account of the trouble he had.

Q. Now, what did you prescribe?

A. I applied heat, in the form of an electric globe; I particularly prescribed dry heat.

Q. Did you prescribe the belt, or whatever he calls it?

A. I have not treated or prescribed a belt. I think the physician who saw him before did that. But I never objected to that, because it was temporarily a good thing to do.

Q. What was the proper thing to do?

A. It was one of the things that some of the doctors recommend for it.

Q. How many times did you call upon to see him?

A. All together about eighteen times, between that time and until the end of the treatment.

Q. Eighteen times, and the other treatments that you gave him?

A. Yes.

Q. What was your bill?

A. Around ninety dollars.

Q. Do you know anything about his condition at the present time?

A. I have not examined him for several months; but he had improved considerably. Several months ago when I saw him, he was not able in my judgment to do a man's work; but he had improved [fol. 201] sufficiently to do light labor.

Q. That was when?

A. That was, I believe, it was sometime in February.

Q. In February he had improved so he could do light work?

A. Yes.

Q. And the accident had occurred in the preceding May?

A. In the May previous, yes.

Q. Now, in general terms, leaving out the technical language that you doctors use, what was the trouble?

A. Well, there is an injury directly to the muscles and ligaments of the spine, not affecting, of course, either the spinal cord, or the vertebra; in other words, it was an injury to the soft parts.

Q. He will ultimately recover, probably?

A. I look for it.

Q. About how long will it be?

A. Well, that is problematical. He may be entirely through with it, and feel as well as he ever did within another six months, or a year. Those cases are very slow to get permanent relief, if ever.

Q. Then, in either case, does it linger longer? Might it linger longer?

A. Oh, it can linger for the rest of one's life.

Q. So you cannot tell then?

A. No one can tell about that. At least, I cannot make a positive statement; that it will be absolutely one hundred per cent well.

Q. But you would be certain it would be some while yet before he recovers from it?

A. I believe that is right.

[fol. 202] Cross examination.

By Mr. Carey:

Q. There is nothing in this case that would lead you to believe this is one of the cases where the injury will be permanent?

A. No; I would not say yes to that. As I said before, I believe he is going to recover entirely in time. However, I cannot say positively and definitely that he would.

Q. But the probabilities are altogether in favor of his permanent recovery?

A. Yes.

Q. You have a young man in good health before?

A. Age has not got entirely to do with it. There are more conditions than mere age.

Q. Oh, I admit that; but that is one condition; a young man of the age of Mr. Haverty would be more likely to recover than a man sixty five years old.

A. Not in the condition of the injury to the spine. In other conditions, age has a great deal to do with it but not in this particular case.

Q. You said there was no injury to the spine; that the injury was wholly muscular?

A. No; I did not say that. I said the muscles and ligaments. It is the injury to these ligaments here that is doing the most damage.

Q. You distinguish between muscles and ligaments, and I did not; and you are probably correct about it?

A. Yes.

Q. What I meant to say was, there was no injury or fracture to the bone?

A. No.

Q. That being so, perhaps this is one of the cases where in all [fol. 203] probability there will be a complete recovery?

A. I would say in all probability. It is a very problematical question. It is hard for us to argue over it. When I say that he probably will be all right, I cannot positively make the statement that he would.

Q. You say you started to treat him in June, 1923?

A. I did.

Q. Then how long did your treatment continue?

A. Off and on for a period of six or seven months. I saw him the last time about February of this year.

Q. You saw him the last time in February of this year?

A. Yes.

Q. Now, he had been getting progressively better during that time?

A. Yes.

Q. And you have no reason to suppose that progress will not continue?

A. Not especially.

Mr. Carey: That is all.

(Witness excused.)

Recess.

#### COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Carey: We prepared an answer last night to the amended complaint, but we have not had a chance to get it verified. I have served a copy upon counsel, and we will have the verification completed, unless counsel will waive the verification.

Mr. Horner: Yes, we will waive that.

[fol. 204] The Court: Very well; you may proceed.

(Answer to amended complaint filed.)

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PHILIP MCGINN, a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Horner:

Q. What is your name?

A. Philip McGinn.

Q. Where do you live?

A. 2310 Western Avenue.

Q. In Seattle, Washington.

A. Yes sir.

Q. How long have you lived in Seattle?

A. Five years.

Q. What is your business?

A. Longshoreman.

Q. What part of the longshoreman's work have you done?

A. Stevedoring.

Q. How long have you been in that business?

A. Five years.

Q. How long?

A. Five years.

Q. You have been a stevedore for five years?

A. Yes; since I came to Seattle.

Q. Were you stevedoring any place else before you came to Seattle?

A. Yes.

Q. How many years have you been stevedoring all told?

A. Oh, for the last eighteen years.

[fol. 205] Q. Where were you, Mr. McGinn, on the 21st of May, 1923?

A. I was on the Andrea Luchenbach.

A. You were working there?

A. Yes.

Q. For the defendant, the International Stevedoring Company?

A. Yes.

Q. Who was with you there in that work?

A. Why, there was Mr. Haverty, and Mr. Hagey, on my side of the ship; and on the other side, the other three men were on the inshore side. We were on the offshore side, and they were on the inshore side.

Q. What hold were you working in?

A. Hatch No. 8.

Q. No. 8 from which deck?

A. On the lower deck.

Q. That is down in the hold?

A. Down in the bottom of the ship.

Q. Approximately how far from the top deck?

A. To the bottom?

Q. Yes, to the bottom?

A. Well, we just figure on it being between forty five and fifty feet, as near as we can judge. We never measured it.

Q. Were you on the bottom of the boat?

A. Yes; we were on the bottom deck. We started on the bottom. That is what I figure the depth was.

Q. Were you loading on that day?

A. Yes; we were loading bales of wool.

Q. Now, how are those bales of wool done up?

A. The bales of wool, as all these bales of wool are, they are all compressed bales, banded up with steel bands; you understand; and those bales stand about that length; and those bales is about two [fol. 206] foot six, perhaps a little bit more; about two or three feet high.

Q. How much does a bale weight approximately?

A. How much do they weigh all together?

Q. The whole bale?

A. Well, four hundred pounds, we figure on.

Q. How many bales did you handle in a sling at that exact time?

A. Four bales in the sling.

Q. Now, Mr. McGinn, were you there when Mr. Haverty was hit?

A. Yes; I had been a partner, just on that bale of wool, at that time.

Q. Now, just state what occurred?

A. Mc. and Mr. Haverty was just lifting up on that bale of wool to move it and stow it in its proper place where it belonged. When this load came down and hit Mr. Haverty, and he dropped. And that is all; me and him had hold of another bale. So I took up him, just after the load hit him, and it was gone, I picked him up and the rest of the boys just came around along with me and we hollered, get a board off the dock; and we got him ashore; used a board, it came in, you know, these regular carrying boards, with four hooks in it, one on each corner. So Mr. Hagey, I think, and me went on the board and we took him ashore; and there was a stretcher there,

and took him down to the little office there on the dock, and he did not want to go into the office; so we took him outside until the ambulance came, and then we put him in the ambulance, and came back to the ship and went to work.

Q. Did you examine his injury there?

A. Well, I sort of did; I just lifted up his shirt at the back and [fol. 207] just moved down his pants a little bit; and the skin was taken off right across the back, behind the back, a little higher up, and towards the hips, and it was turning black and blue at the time.

Q. Was it swollen any? Was the skin torn off? Was the skin rubbed off?

A. Yes; part of it was rubbed off; and all of the rest was all bruised, and red, and black, as far as I could see and understand.

Q. What time did you fellows go to work there that morning?

A. Eight o'clock.

Q. What time did this accident occur?

A. Well, about nine o'clock, as near as I can guess.

Q. How many loads had come down before Mr. Haverty was hurt?

A. Well, we never kept track of how many loads come down; but I guess may be about fifteen or sixteen or seventeen loads, I would say.

Q. Now, who was the hatch tender on that day?

A. Lee Carles.

Q. Now, was there any signal given by the hatch tender of the lowering of the load that hit Mr. Haverty?

A. No sir.

Q. Had there been any signals given by Mr. Carles, the hatch tender, of the load that had come down before Mr. Haverty was hit?

A. Yes; every load that came in, all of the time, before that, Mr. Carles is on deck on that ship, and he goes to the rail; he gives a signal to that winch driver, you see, like that, he is amidship, and here is the fall, and he just holds his two hands up like that; and when the winch driver understands, and he has hold of these levers, [fol. 208] you see, you understand me now. He is standing there holding on these levers, leaning down, until that man come amidship, and then this fall, then he lifts that load off the dock; you understand; then he says, "take her in." Then he walks across and looks down in the hatch; and if everything is clear, if you are working off-shore side, if you are loose, see? If you aren't ready for it to come down, he will say "hold her," put his hand up, "hold her," and the winch driver holds her there, until he has that load stowed away; and then he lowers her down there; and then they have to unhook that load and hook on an extra sling, and off we are again.

Q. Did Mr. Carl-, the hatch tender, give any signals for the load that hit Mr. Haverty?

A. No sir.

Q. You are positive he did not?

A. I am positive sure he did not.

Q. Are you positive that he had given signals for the previous loads?

A. Yes.



Q. Had the winch driver given any signals or had he been giving any signals?

A. What has the winch driver got to do with signals?

Q. Well, I am asking you, if he gave any signals?

A. He is to move on the signal of the hatch tender.

Q. Now, just state what are the duties of a hatch tender?

A. The duty of the hatch tender is first, in the morning he comes, and stevedores along with him, too. The first thing they do, when they go on the ship to turn around and rig their booms up. Have [fol. 209] one boom rigged up like that, starting amidships, and stand and look at her. Any man with any stevedore with any experience looks for the center of the hatch, and then we turn around, and we swing the other boom towards the dock, tighten up all gears, and go to work and take off our hatches, take our strong backs off all the way down to the bottom of the hold, and level off the floor, level off the floor if it is not leveled off, and start to work.

Q. Have you seen this drawing here?

A. No sir.

Q. Just step down here and look at it?

A. Is this the middle of the ship or a drawing of the ship?

Q. Well, it is not a very good one.

A. This is No. 8, this one? (Indicating.)

Q. Yes; this is No. 8.

A. No. 8, yes.

Q. Now, where were you working just before he was hit?

A. Before he was hit? Is this the bottom of the hold?

Q. Yes; that is the bottom of the hold?

A. Here you are (indicating). Here is the forward end comes right down like that; this is the better one. I want to see what I am doing. Now, here is the forward end of No. 8 hatch. This is the way the combing comes around there. Now, we were working out here, on the hatch.

Q. You were working on the forward end?

A. We were working out. We were posted out there, right amidships, so we could stow and do the work; and we came out amidships; and if you want to come out amidship when you are through with your load, you don't want to get all the little stuff, and all on top of [fol. 210] the little ones, and you come out and put yourself—put those in there this way (indicating).

Q. Now, at the time that Mr. Haverty was hit, had the previous load been taken care of. Had he got rid of the other load just before that?

A. Had we got signals?

Q. No; had Haverty?

A. Had he what, what did you say?

Q. Had he taken care of the load that had come down just before the load that hit him came down?

A. Had he took care of it?

Q. Yes; had he stowed it away?

A. Me and him were stowing the load. We were not through with the load that was down there already.

Q. And that is what I want to know?

A. Then why didn't you ask me the question right.

Q. Then this load that hit him came down before you got through with the other load?

A. Yes, certainly so.

Q. Now, for about say fifteen minutes before he was hit, where had you been working?

A. Where had we worked?

Q. Yes?

A. No, 8 hatch.

Q. Well, I mean in what part of the hatch?

A. Oh.

Q. Whereabouts in the hatch? In the fore part of the hatch, or in the aft part?

A. Well, just depending upon which way we had our flooring; if [fol. 211] we finished up that floor, then we would get through with it, we would be working in the wings; and then we would come out and get through with that floor, and we start out on amidships again. There is not any break; we leave no breaks at all on the amidships; no holes at all for anybody to drop into, for safety for ourselves, have no holes to drop into.

Q. How soon before Mr. Haverty was hit had he come out of the far end?

A. Well, we had stowed about three loads. After we finished the floor, we come out amidships; and we had stowed about three loads aft; on our side. I guess they had about the same on the other side. That is as near as I could get at it.

Q. You had been working back in there under the wings?

A. Yes; it is only a little back like that, where the wings are, in like there; and that comes up like this; we were stowing our bales all of the time, and we were working that way towards the wing; that is how we were all of the time stowing in the hold of that ship; and that is where we come, so I only saw head high; and we have a—have to beam up, and we come out even with the comb of that hatch, right around, right around with the square of the hatch; and we turn around and fill that hatch up on the square, and we come within six inches of the next combing; and turn around and get our strong backs, and put his hatches on, and cover the freight and in that way we come up to the next deck.

Q. Now, what wages were you men earning at that time?

A. We were getting eighty cents an hour, and a \$1.20 an hour over time.

[fol. 212] Q. Now, what is the average longshoreman's income, average earnings a month?

A. Why, them gangs—do you mean the gang?

Q. What would each man earn?

A. Each man. Oh, I never figured it up what they earn. These men that was in gangs; I was in no gang at all; I have been an extra man; rather have—extra man all of the time; and they don't like to put men in a gang at all; they all put in extra men; and their wages run from about \$175.00 to \$180.00 a month. I guess I was making more than that myself.

**Q.** You were earning \$175.00 a month?

A. I guess \$175.00; yes.

Mr. Horner: That is all.

Mr. Carey: That is all.

(Witness excused.)

## COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Horner: If the Court please, if opposing counsel will agree that the hospital, doctor, and other charges total the sum of \$260.00, and that is reasonable.

Mr. Carey: Yes; I think we will agree to that.

The Court: And that those expenses were incurred because of this injury.

Mr. Horner: Yes.

**The Court:** Let the record show that

Mr. Horner: I will not recall Mr. Haverty for a mere matter of competition, but upon the basis that he was earning \$175.00 a month, and was unable to work for eight and one half months, the total of [fol. 213] that would be \$1487.50, and that, with the \$260.00, would total \$1747.50; that is alleged, and is shown by the evidence.

**The Court:** Is there anything else?

**Mr. Horner:** That is our case.

Plaintiff rests.

Mr. Carey: If your Honor please, I would like to make a motion at this time.

**The Court:** The jury will be excused until they are recalled. You can either go out into the corridor or the jury room as you see fit. Do not remain in the court room while the argument is going on.

(Jury retired from the court room.)

**The Court:** Is the plaintiff offering in evidence these documents?

Mr. Horner: We have not offered them as yet.

The Court: They may be admitted in evidence and marked Plaintiff's exhibit A and Plaintiff's exhibit B.

Documents received in evidence and marked Plaintiff's Exhibit A.  
 " " B.

Mr. Carey: At this time, the defendant, at the close of the plaintiff's evidence, challenges the sufficiency of the evidence, and moves the court for a directed verdict, or a judgment of dismissal, in favor of the defendant, upon the ground that no actionable negligence for [fol. 214] the recovery of damages against the defendant has been shown, but, on the contrary, the evidence introduced by the plaintiff, affirmatively shows that such injuries that plaintiff may have sustained were caused by—either by the contributory negligence of the

plaintiff himself, or in consequence of risks which the plaintiff assumed as a part of his employment as a stevedore, or in consequence of the negligence of either the winch driver or the hatch tender, both of whom were the fellow servants of the plaintiff, maritime law; and therefore, for such negligence, there can be no recovery against the employer.

I make this motion, and set up the claim that we claim immunity from any liability in this case upon the record now made, by reference to the Federal Maritime law, which is controlled in this case, even if it be assumed that the decisions of the Supreme Court of the State of Washington upon this question may be the other way, which we do not concede. In other words, we take the position that under this evidence, tested in the light of the decisions of the Supreme Court of the State of Washington, the court will be required to grant this motion, and even if it be assumed that the decisions of the Supreme Court of the State of Washington would justify letting this case go to the jury, even independent of the Maritime Law, the Maritime Law, as manifested by the decisions of the Federal Courts, and the Courts of Admiralty, require that this not be sent to the [fol. 215] jury, but rather be dismissed.

(Argument was then presented by counsel to the court.)

Thereupon, the further hearing of said cause was continued to May 5, 1924, at 9:30 o'clock A. M.

[fol. 216]

May 5, 1924—9:30 o'clock a. m.

Trial resumed. Jury and all parties present.

The Court: In this case of Haverty vs. International Stevedoring Company, I am going to ask for further argument in that case; but it seems to me that the argument should take place at the conclusion of all of the evidence, and may go to the instructions as to the measure of damages. In the case cited to me, decided by Judge Gilliam, in which it was law, or the law as settled by the United States Court should control, it was decided in that case, that in any event, the injured seaman was entitled to maintenance and cure. Now, that being the case, it would only be a question to be decided at the conclusion of all of the testimony, as to whether he is entitled to recover damages for his injuries, or whether he would be limited, under the Federal Law, to maintenance and cure. For that reason, the motion will be denied at this time, with the right to renew the motion and argument at the end and conclusion of all of the evidence, and upon instructions as to whether you should be allowed to recover.

Mr. Carey: We would like to note our exception to the ruling of the court.

The Court: Another thing, I want the attorneys to be prepared to fully advise me as to what is recoverable under the terms "maintenance and cure." I do not know.

[fol. 217] Mr. Horner: Yes, I think your Honor has a misconception of the law.

The Court: I am not making any ruling this morning. I am reserving the ruling until the end of all of the testimony; and then I will hear from you as to your right to recover for injuries; but in event that I should decide you are limited to maintenance and cure, I would like to know what is considered under those terms. You may bring in the jury.

(The jury returned to the jury box.)

Mr. Carey: I presume the stenographer has noted our exception.

The Court: Yes; note in the record that an exception is reserved and allowed to the court's ruling.

Mr. Litchman: We have not put in a formal written reply to the answer; but we will reply denying in toto the affirmative defenses as set forth therein.

The Court: All right. The jury is now present. Proceed with the trial.

Mr. Carey: I would like to have the record show we now serve upon the other side and present to the court our requested instructions. (Handing document to the court.)

The Court: Very well.

Mr. Litchman: Let the record show that each side has served the requested instructions upon the other side.

Mr. Carey: Yes. I received their copy this morning.

The Court: All right. Did you serve two copies or did you serve [fol. 218] but one copy. Did you reserve one for the files?

Mr. Horner: Well, I will straighten this up later.

The Court: Well, we will file this one, so that you are within the rule, anyway. Mark this 5. Proceed with the trial.

(Instructions were then filed by the Clerk.)

And thereupon, to sustain the issues herein in his behalf the defendant introduced the following testimony:

Mr. Carey: I introduced in evidence some photographs the other day, and they were marked defendant's exhibit 1, and defendant's exhibit 2, which were admitted. But I am a little uncertain as to just the exact extent of that admission, but anyway, it is now admitted that these photographs which were taken last Thursday show the ship as far as the hatch and winches are concerned, substantially as the hatch and winches were a year ago, at the time this accident occurred.

Mr. Horner: This is a photograph of hatch No. 8 on the Andrea Luchenbach Steamship.

Mr. Carey: As it was at the time of the accident.

Mr. Litchman: At the top, and not at the bottom.

Mr. Horner: One thing, I will limit that admission, the only way I will limit that admission is, that I contend that the way that man is standing there, and the way the photograph is taken, makes it a

little more favorable to the defendant's side; but they are both genuine photographs of hatch No. 8 of the Andrea Luchenbach.

[fol. 219] R. W. WHALEY, a witness on behalf of defendant, being first duly sworn, testified as follows:

Direct examination:

By Mr. Carey:

Q. State your name?

A. R. S. Whaley.

Q. What is your business?

A. Mechanical engineer.

Q. What has been your training in that work?

A. I have designed rigging for ships during the war period; and I have operated and designed winches and rigging for other purposes.

Q. You have been educated as a mechanical engineer?

A. Yes.

Q. Did you take a degree in that course?

A. Yes.

Q. At what institution?

A. University of Washington.

Q. Where?

A. At the University of Washington.

Q. When did you get that?

A. In 1910.

Q. Since that time, have you been employed continuously in mechanical lines of work?

A. I have followed the profession of Mechanical Engineer since then.

Q. Now, what experience, or what length of experience have you had in connection with the designing of ships and ship's rigging?

A. A couple of years.

[fol. 220] Q. Where and when?

A. At the Ames Shipbuilding & Dry Dock Company, during the period of the war.

Q. Now, Mr. Whaley, were you on the steamship Andrea Luchenbach on last Thursday?

A. I was.

Q. There has been introduced in evidence as Defendant's Exhibit 1 and Defendant's Exhibit 2, two photographs, which it is admitted were taken on that occasion. I will ask you if the person standing in the position of winch driver there is yourself?

A. It is.

Q. You recall the taking of these two photographs?

A. I do.

Q. Now, did you take some measurements on that occasion?

A. Yes.

Q. Did you measure the dimensions of the hatch?

A. Yes.

Q. Give us exactly what the dimensions of that hatch are?

Mr. Horner: We object for the reason we have already admitted what the dimensions were.

The Court: He may answer.

A. The dimensions of the hatch are, across ship 24 feet; and with the ship 21 feet; that is an approximation to take care of the half inch shorter in each case.

Q. Now, Mr. Whaley, did you also take measurements of the height of the hatch combing, above the deck?

A. The height of the hatch combing above the winch platform—

Q. Yes?

A. Was 16 inches at its highest point; and it had a 2½ inch angle [fol. 221] iron running around the combing to catch the hatch cover.

Q. Did you also take measurements to determine the distance back from the hatch combing to the winch, on the nearest portion of the winch.

A. The distance I have here is the distance from the hatch combing to the operating levers of the winch.

Q. That is what I mean; the operating levers of the winch are of course naturally the part of the winch closest to the hatch combing?

A. Yes.

Q. What is that distance?

A. 15 inches from the top of the hatch combing to the end of the operating levers of the winch.

Q. Now, those operating levers you speak of are the levers you have hold of as shown in these photographs?

A. In this photograph and also in this photograph I have my hands on the operating levers in the position an operator would assume in operating the levers.

Mr. Horner: Just a minute; we object to that because it is not relevant to the issue here; we contend that it was the negligence of the hatch tender in failing to give a signal or sing out to the men below. We are not interested in the location of the winch driver, what the winch driver did is not relevant.

Mr. Carey: Well, of course, the contention of the plaintiff has been that the cause of his injury was not sounding a signal on the deck of the boat—

The Court (interrupting): What was that question. Will the [fol. 222] Reporter please read it. My attention was engaged on these instructions.

(Record read.)

The Court: The answer may stand. Objection overruled.

Q. Now, standing in that position, Mr. Whaley, state whether or not you could see over the hatch coming down into the hatch substantially in a vertical direction?

Mr. Horner: Now, just a minute; I want to get my objection into the record. We object to that, because it is irrelevant, immaterial and incompetent: First, because the basis of this action is that no matter what the winch driver could have done, if the hatch-tender failed to give a signal, why, the defendant is liable for any damages arising by reason of that omission of duty on his part. Second, we contend that if the hatch tender failed to give the men working in the hold time to take care of the previous load, and lowered another load which struck the plaintiff, that that would be the negligence of the defendant,—that is a matter of master and vice-principal. Third, that if the hatch tender, as the tender of the hatch, negligently goes away from the hatch, leaving the winch driver in the position of running the work, if he does it either expressly or impliedly, or even does it knowing that the winch driver will go ahead with the work without his being there that those acts of omission and commission upon the part of the hatch tender constitute a negligence that binds the defendant in this case; in other words, they can't, in the language of the street, they can't make a "goat" out of this winch driver; and [fol. 223] they cannot shift the burden that is on the hatch tender on to the winch driver.

The Court: On what issue, Mr. Carey, do you think that is material.

Mr. Carey: Why, to meet the evidence that Mr. Horner himself put in. If he was permitted, as he was, to put in the testimony of men who never had stood, some of them, in the position of this winch driver, and they undertook to then tell this jury that the man in the position of the winch driver could not see down into this hatch, we certainly have the right to meet that evidence, and show that that man could see down into the hatch standing in the position of the winch driver.

The Court: Well, Mr. Horner was the one who put that in. He may answer the question. They have gone into it, and you may meet it. I will overrule the objection; and you can have your exception.

(Question read.)

A. Yes.

Q. State whether or not at the time these pictures were taken you were actually looking down in that direction?

A. I was; yes.

Mr. Carey: I think these have already been admitted. You may cross examine.



Cross-examination.

By Mr. Horner:

Q. Did you ever work on a ship as a laborer?

A. Yes.

Q. Did you ever drive a winch?

[fol. 224] A. Yes.

Q. For how long?

A. I drove winch perhaps for five or six hours.

Q. You learned all about it in that time?

A. No, I did not learn to drive a winch from my experience in driving them on a ship.

Q. Did you ever act as hatch tender?

A. No.

Q. Now, how fast do these loads in the sling when they arrive over the hatch, how quickly do they descend into the hold of the ship?

Mr. Carey: I object to that as not cross examination.

The Court: Objection sustained.

Mr. Horner: Well, if you will admit that this man was going too far when he is not qualified——

Mr. Carey: No.

The Court: He has not testified to that.

Mr. Carey: Now, don't be unfair.

Mr. Horner: I am not. If he is—if the Court thinks there is any unfairness in my remark, I will withdraw it now; but here, they put a man on who has been five or six hours on a winch, and yet they put him up here to talk about these things.

The Court: Well, Mr. Horner, I will permit you to cross examine him as to anything touched upon in the direct examination. That is the rule; of course, but he was asked nothing about the descent of loads so it is improper cross examination and I will sustain the objection.

Q. Were you ever a hatch tender?

[fol. 225] Mr. Carey: I object to that for the same reason.

The Court: I will sustain the objection.

Q. Did you ever handle loads on winch No. 8 on that Andrea Luchenbach?

A. No.

Mr. Carey: I object——

Q. You just stood there for that photograph?

A. Yes.

Mr. Horner: I think that is all.

Mr. Carey: That is all.

(Witness excused.)

Mr. Carey: We rest.

Defendant rests.

The Court: Is there any rebuttal?

Mr. Litchman: We have no rebuttal. We rest.

Testimony closed.

### COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Carey: We desire to present a motion in the absence of the jury?

The Court: The jury will be excused. There is going to be some legal argument which I think will take the remainder of the morning, and I will excuse the jury until 1:30 this afternoon. Bear in mind and remember the admonition I have heretofore given you not to talk with anyone about this case until it is finally submitted to you. Be here at 1:30 this afternoon when we will proceed with the [fol. 226] trial. You may now be excused until 1:30 this afternoon.

Jury excused.

The Court: You may proceed, Mr. Carey.

Mr. Carey: Now, at the close of all of the evidence, the defendant, International Stevedoring Company, renews its challenge to the sufficiency of the evidence, and asks the Court either for a judgment of dismissal of this case, or for a directed verdict, upon the grounds:

First, that no acts are shown which constitute liability upon the part of the defendant, under the laws and decisions of the state of Washington.

Second, on the ground that under the undisputed facts, no liability has been shown under the maritime law.

The refusal of the Court to sustain our challenge, at the close of the plaintiff's case, and the refusal of the Court to sustain our challenge now, if it is refused now, would deny to the defendant its rights and immunities under the general maritime law and the Constitution of the United States.

The Court: Well, I will ask you even conceding he is a seaman, and a member of the crew, and he could not recover any damages for his injuries because of the fact that the hatch tender is a fellow servant, wouldn't he be entitled to his maintenance and cure even if he is a seaman, when a seaman is injured, he is entitled to maintenance and cure.

[fol. 227] Mr. Carey: But this case has not been brought upon any such theory.

The Court: Well—

Mr. Carey: Even if the Court be of the opinion that that rule was applicable, then, without waiving the challenge already made, and without waiving the instructions already requested, for the record, I make the further motion now, on the condition that the court is of the opinion that the rule indicated would be applicable

to this case, that the jury be instructed to return a verdict in the sum of two hundred and sixty dollars and the odd cents, whatever the amount is, and no more, representing the amount of maintenance and cure proven by the plaintiff.

The Court: Well, he has lost a long time.

Mr. Carey: That is not maintenance and cure.

The Court: That is what I want to find out, what that means, maintenance and cure.

Mr. Carey: Maintenance and cure is just what it would indicate.

The Court: That would mean his board during this time he is disabled.

Mr. Carey: Yes, if he has sustained any and has proven any; but the only items which are recoverable under that theory, and the only items the jury could return a verdict for is such of those items as he has proven, and the only thing he has proven is \$260.00 as the cure item, what was that amount Mr. Horner.

Mr. Litchman: Which one was that? \$260 was his hospital and doctor bills.

[fol. 228] Mr. Carey: \$260 even?

Mr. Litchman: That is correct.

Mr. Carey: That is the amount he could have. Even if there were other items recoverable under that rule, no proof of them has been made, and there is nothing for the jury to base a verdict upon.

The Court: Well, I will hear from the plaintiff as to what right he has to recover in the State Courts for damages because of injuries sustained by the negligence of a hatch tender? Now, in this argument of those points to the Court, the State courts have held that a hatchtender is a vice principal, and that his negligence is not the negligence of a fellow servant. That is, our State decisions are that the hatchtender was put in charge of the hatch and his duties were to take care of the incoming loads, and to warn the stevedores down in the square of the hatch that the loads were coming, and the evidence has been that he had done so before, that, and they had relied upon his warning and continued to rely upon it, and that he failed to give a warning in this particular load, and that it descended upon plaintiff and hurt him, and that it was the negligence of the master and damages are recoverable for the injuries sustained. Now, those are the decisions of the State Courts. The question here is, first, whether a stevedore occupying the position this man was *was* a member of the crew so that the rules of maritime law would govern. I think that is the question for you to answer.

[fol. 229] Mr. Litchman: Do I understand you to say that there is no use for me to argue,—or, rather, that you have stated that under the decisions of the state courts the hatch tender is a vice principal; and consequently I can leave that part of it out of the argument, and go directly to the question whether or not a plaintiff can recover in the state courts on the maritime principle for damages alone on account of maintenance and cure. Is that what your Honor has reference to?

The Court: Yes; and that would involve, of course, the question whether a stevedore is a seaman within the contemplation of the law.

Mr. Litchman: I might call your attention to this fact, that a stevedore is not a seaman.

The Court: If you want to say that, then you have said a whole lot. That is, he may not be, generally speaking, a seaman; but when he was acting as he was acting there on this vessel, whether he was a seaman within the contemplation of the maritime law.

Mr. Litchman: No; I can answer that immediately by saying that he has never been considered a seaman and he is not a seaman.

The Court: Well, then, I will ask you this question, so we can get squared away right. In the Dawson case, where they were seeking to collect an assessment under the industrial insurance act for longshoremen, the Court upheld Dawson's refusal to pay that assessment upon the ground that longshoremen were seamen.

[fol. 230] Now, the Court had in mind, in the Dawson case and all the other cases cited by counsel that they held that a longshoreman working on a ship, while his work was of a maritime nature, that is all they held; they did not hold, however, he was a seaman.

(Argument of counsel.)

The argument was continued until 12 o'clock noon, whereupon the further argument was continued to be resumed at 1:30 P. M. May 5, 1924, at which time the argument was resumed to its conclusion.

The Court: I think I will not hear any further argument, I will overrule and deny your motion, Mr. Carey, and I will instruct on the lines that the hatchtender is a vice principal, and that therefore the master is liable for his negligence.

Mr. Carey: I would like to take an exception to your Honor's ruling; and in this instance, inasmuch as this involves a Federal question, I would like to have and take my exception in writing, so there can be question about it.

The Court: I do not see much if any dispute in this case as to the facts. There is and there has been apparently no great dispute as to the facts, that these men were all working there in the hold, and plaintiff was hit by this descending load; and furthermore that the hatch tender failed to give the signal. Do counsel consent that I may instruct the jury orally.

Mr. Horner: Yes.

Mr. Litchman: That is acceptable to us.

[fol. 231] Mr. Horner: That is satisfactory as far as we are concerned.

The Court: Because the instructions are practically all here—

Mr. Carey: I have no objection to the Court instructing the jury orally; reserving, of course, the usual time to take exceptions.

The Court: Oh, yes, you may have them.

Mr. Carey: Your Honor then denies my challenge?

The Court: Yes.

Mr. Carey: I also would like to have your Honor give me a written exception.

The Court: Oh, yes.

Mr. Carey: To your refusal to sustain my challenge.

The Court: Yes. I will do that; I will give you that.

Thereupon, the defendant, by its counsel, in open court, in writing excepted to the refusal of the court to grant said challenges and each of them; which exception was allowed; said exception and the allowance thereof by the court being in words and figures as follows, to-wit:

(Title of Cause)

### Exception

"The defendant excepts to the refusal of the Court to sustain its challenge to the evidence at the close of plaintiff's case, and at the close of all the evidence on the following grounds:

1st. That no facts are shown constituting liability under the laws and decisions of the State of Washington.

[fol. 232] 2nd. That under the undisputed facts, no liability has been shown, under the maritime law and the refusal of the court to sustain said challenges and each of them denies to the defendant its rights and immunities under the general maritime law and the Constitution of the United States.

The foregoing exception allowed in open Court during the court of the trial this 5th day of May, 1924.

(Signed) Calvin S. Hall, Judge."

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### DEFENDANT'S REQUESTED INSTRUCTIONS TO JURY

During the court of the trial, defendant, by its counsel, in writing, made timely request that the Court give the following instructions to the jury to-wit:

The defendant respectfully requests the Court to give the following instructions to the jury:

### I

"It is established by the evidence and admitted by both parties to this case that at the time of the alleged injury to the plaintiff he was employed by the defendant and working as a stevedore loading cargo in the hold of the seagoing vessel, 'Andrea Luchenbach,' then afloat in the waters of Puget Sound in the Port of Seattle, King County, Washington. You are advised that the plaintiff while so employed and working in the course of his employment, was engaged in a maritime service and the rights and liabilities of the plaintiff and defendant are therefore governed exclusively by the maritime law. You are further advised that under the maritime law a stevedore in [fol. 233] the situation of the plaintiff cannot hold the employer

liable for damages sustained in consequence of the negligence of a fellow servant. Fellow servants are workmen engaged in the same general undertaking, that is, workmen employed by the same employer, engaged in the same common enterprise, employed to perform duties tending to accomplish the same general purposes. Workmen are fellow servants if the services of each in his particular sphere or department are directed to the accomplishment of the same general end. All members of the stevedoring crew working aboard the ship including the winch driver and the hatch tender are fellow servants under the maritime law. As it conclusively appears in this case that the plaintiff if not injured as a result of his own negligence, was injured in consequence of the negligence of the winch driver or the negligence of the hatch tender, or the concurring negligence of both winch driver and hatch tender, and as these workmen were fellow servants of the plaintiff under the maritime law, you are instructed to return a verdict for the defendant."

*Atlantic Transport Co. vs. Imbrovek*, 234 U. S. 52; 58 L. Ed. 1208.

*Southern Pacific Co. vs. Jensen*, 244 U. S. 205; 61 L. Ed. 1086.

*Chelantes vs. Luehnbach S. S. Co.* 247 U. S. 372; 62 L. Ed. 1171.

*Carlisle Packing Co. vs. Sandanger*, 259 U. S. 255; 66 L. Ed. 927.

*Heino vs. Libby*, 116 Wash. 148.

*New England Ry. vs. Conroy*, 175 U. S. 327.

*The Hoquiam*, 253 Fed. 627.

*Western Fuel Co. vs. Garcia*, 280 Fed. 839.

*State of Washington vs. Dawson*, — U. S. —.

[fol. 234] Without waiving the foregoing request for an instructed verdict, but in the event that the Court shall refuse to grant same, then defendant requests that the following instructions be given to the jury:

## II

You are instructed that a workman cannot hold his employer liable for injuries sustained in whole or in part in consequence of his own negligence. The failure of the workman to take any precaution for his own safety which an ordinarily prudent and careful man similarly situated would take is contributory negligence. A workman in hazardous employment is not justified in taking for granted what a reasonably prudent and careful man would investigate as a means of self-preservation. The failure to observe those things which a reasonably prudent and careful man under similar circumstances would observe amounts to contributory negligence and bars a recovery against the employer. The amount of care a workman is required by law to use for his own protection is proportionate to the dangers of the particular place and situation, the greater the danger the greater the care required.

## III

An experienced workman assumes as part of his employment all the risks and hazards naturally incident to the work in which he voluntarily engages, and if injured in consequence of such risks, he cannot recover against the employer. The employee assumes all the risks and dangers, apparent to him and as well all risks and dangers, which, in the exercise of reasonable care and caution should be [fol. 235] come apparent to him. The employer is not required to warn an experienced workman of dangers which would become at once apparent to the workman by the use of his own faculties.

## IV

If you find that the plaintiff's injury was caused by his own negligence, or by the negligence of the winchdriver or by the concurring negligence of the plaintiff and the winchdriver, it is your duty to return a verdict for the defendant.

## V

Even though you should find that the hatch tender was negligent in the performance of his duties, or some of them, still if you believe that the injury to the plaintiff was caused by the subsequent independent negligence of the winchdriver, it is your duty to return a verdict for the defendant

(Signed) R. E. Biggam, Stephen V. Carey, Attys. for Defendant.

[fol. 236]

## CHARGE TO JURY

Thereupon the Court charged the jury as follows:

LADIES AND GENTLEMEN OF THE JURY: This is an action brought by the plaintiff, R. Haverty, against the defendant, International Stevedoring Company, a corporation, to recover damages for personal injuries that plaintiff alleges he received because of the negligence of the said defendant. The pleadings in the case consist of the amended complaint, the answer to the amended complaint, and the—well, you have not filed your reply?

Mr. Carey: It was agreed that the affirmative defenses might stand as denied.

The Court: In the amended complaint, the plaintiff alleges that while working in the hold of this vessel, the Luckenbach, on the 21st day of May, 1923, stowing away certain bales of wool, he was struck by a descending sling load of freight, consisting of these bales of wool, and he was injured as alleged in the complaint. He alleges that the defendant was negligent in the following particulars: That there was a hatch-tender on duty, whose duty it was to supervise the bringing in of the sling loads of freight from the dock, and the



lowering of it into the hold of the vessel; that it was his duty, before it was lowered into the hold, where plaintiff was working, to give the plaintiff and his fellow workers down there who were stowing the previous sling load away notice or warning of the lowering of the sling load of bales of wool so they might get out of the way; but that in this instance he failed to do so, although on previous loads he had given that warning to them; and because of his failure to give that warning, plaintiff did not get out of the way and was struck by the descending sling load of freight. He claims he was [fol. 237] injured as you will find in the particulars mentioned in the complaint, and that because of such injuries he had to incur physicians' bills and hospital bills and bills for medicine in the sum of two hundred and fifty dollars, and that he lost eight and one half months' wages at one hundred and eighty dollars a month which he was earning approximately.

Mr. Horner: Between one hundred and seventy and one hundred and eighty.

The Court: Well, I am stating what is alleged here, one hundred and eighty dollars a month, and that by reason of his injuries he was otherwise damaged in the sum of five thousand dollars, making a total of six thousand seven hundred and ninety dollars; and he asks for damages for that amount, and judgment for that amount, together with his costs.

The defendant has answered denying any negligence on its part, denying the extent of the injuries and damages; and setting up, as affirmative defenses the following:

First. That plaintiff's injuries, if any he sustained, were caused solely by his own negligence.

Second. That his injuries were caused by risks and hazards incident to his employment, and that they were such risks as he had assumed in undertaking such employment.

Third. And the third defense is that his injuries, if any, were caused by the negligence of a fellow-servant, and therefore he could not recover;

And the defendant asks that said action be dismissed.

In open court, it has been stipulated, while there has been no written reply filed to this answer, that each one of these affirmative defenses is denied by the plaintiff.

The burden is upon plaintiff to establish by the fair preponderance of the evidence the material allegations of his complaint which [fol. 238] are denied by the defendant. Likewise, the burden is on the defendant to establish by a fair preponderance of the evidence the material allegations of its affirmative defenses.

By the fair preponderance of the evidence is meant the greater weight of the credible evidence in the case. You are the sole judges of the facts, and of the degree of credit to be given to the different witnesses who have testified before you, and to determine the weight of their evidence. I have nothing to do with the facts; that is your



sole province to determine what they are. I have no right to comment on the facts, and if it has appeared to you that, in ruling on any question of testimony or in discussing matters with the attorneys, I have commented on the facts, you must disregard all of those comments.

It is undisputed in this case that the plaintiff while working in the hold of the *Andrea Luckenbach*, a vessel, as a longshoreman, on the 21st day of May, 1923, and was stowing away freight in that hold he was struck by a descending load of bales of wool and injured. It is further undisputed by the evidence that there was at the same time, engaged on the deck of the vessel, a hatch tender, that he had previously during that day and immediately prior to the time the plaintiff was injured, had been giving signals or warnings to the men employed in the hold of the vessel of the approach of the slingloads of freight; and it is further undisputed from the testimony that at the time this slingload of freight was lowered into the vessel it struck the plaintiff, that no warning signal was given prior to its descent, prior to its being lowered, by the hatchtender to those down in the hold.

[fol. 239] If you find from the evidence that the failure to give this signal by the hatchtender was the proximate cause of the injury,—that is, an efficient cause but for which plaintiff would not have been injured,—if that was the proximate cause of the injury and damage to plaintiff, then your verdict must be for the plaintiff.

I will withdraw from your consideration the questions raised by two of the affirmative defenses: First, as to fellow servant; you are not to consider that in this case, because it is not a defense. Second, neither are you to consider the defense that this was one of the hazards incident to his employment that he assumed; that is not in the case.

Defendant has alleged another affirmative defense, that of contributory negligence upon the part of the plaintiff, that is, that his own negligence is the sole cause of the injury. Negligence, ordinarily, is a failure to use that degree of care that an ordinarily careful and prudent person would use under like circumstances, like or similar circumstances. Contributory negligence is negligence on the part of one who receives an injury which materially contributed to the cause of his injury, and but for which he would not have been injured. And if you find in this case that plaintiff himself was negligent, was guilty of contributory negligence, then he cannot recover, notwithstanding the fact you find that the defendant was also negligent.

If your verdict is for the plaintiff, you will allow him such sum as in your opinion will fairly and justly compensate him for the damages you find he has sustained because of the negligence of the defendant as alleged in the complaint; and in determining the [fol. 240] amount of such damages, you will have the right to take into consideration, and you should take into consideration the pain and suffering you find from the evidence he has undergone, and the pain and suffering that he will reasonably undergo in the future, if you find any from the evidence; and also the loss of earnings that

he has sustained because of such injury, (or that he reasonably may sustain in the future.) You will take into consideration the impairment, if any, to his earning capacity, and the nature, extent and duration of his injury. You may also allow him, if your verdict is for the plaintiff, the entire amount that you find from the evidence he incurred because of such injury in the way of hospital bills,—are they in evidence?

Mr. Litchman: Yes, your Honor.

The Court: And doctor bills, and bills for medicine. But if your verdict is for the plaintiff, in no event shall it be for more than he has asked or prayed for in his complaint.

Upon retiring to the jury room, you will select one of your number as foreman, whose duty it will be to sign whatever verdict you agree upon. You will be furnished with two forms of verdict, one for the plaintiff, and if you find for the plaintiff you will use that form, filling in the amount you allow him; and in the other case, you will use the one for the defendant if you find for it.

This being a civil action, ten of your number may agree upon a verdict; and when ten of you have agreed upon a verdict you will have that form of verdict signed by your foreman and return it into Court. Is there anything else? We will now listen to the argument of counsel.

#### COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Carey: I don't know that I correctly understood your Honor. Do I understand your Honor to instruct the jury that they could [fol. 241] not consider the defense of assumed risk?

The Court: Yes.

Mr. Carey: Or fellow servant? Either one of them?

The Court: Either one of them.

Mr. Carey: You instructed them they could not consider either one of them?

The Court: No; because of the undisputed facts under the evidence. I intended to do that.

Mr. Carey: I want to take an exception, although apparently inadvertent it was a comment by the court upon the facts of the case.

The Court: As I said before, I do not intend to comment upon the facts. That is your province; and I have nothing to do with that; and that last remark that I made, I do not consider it as a comment upon the facts; and you must disregard it if I did. You may proceed with the argument.

Mr. Horner: How long, your Honor.

The Court: Half an hour on a side.

(Argument by counsel for plaintiff.)

At the conclusion of Plaintiff's opening argument:

Mr. Carey: Have you finished your opening argument?

Mr. Horner: Yes.

Mr. Carey: We waive our argument.

The Court: Ladies and gentlemen of the jury, you may retire to consider your verdict.

Jury retired.

Trial concluded.

[fol. 242] DEFENDANT'S EXCEPTIONS TO INSTRUCTIONS TO JURY

That thereafter, and before the hearing of defendant's motion for a new trial, the defendant, in writing, excepted to the instructions given by the Court, and to the refusal of the Court to instruct the jury as requested by defendant, said exceptions being in words and figures as follows, to-wit:

(Title)

"Comes now the defendant, International Stevedoring Company, a corporation, and excepts to the instructions given by the Court to the jury, and to the refusal of the Court to instruct the jury, as requested by the defendant, as follows:

I

"The defendant excepts to that portion of the Court's charge by which the Court instructed the jury,

"Likewise, the burden is on the defendant to establish by a fair preponderance of the evidence the material allegations of its affirmative defenses,"

"In view of the fact that later on in the charge the Court in effect instructed the jury that even though the jury should find the defenses of assumed risk and fellow servant established in favor of the defendant, the jury should disregard said defenses and each of them, the jury should disregard said defenses and each of them, thereby putting upon the defendant the obligation of establishing its said affirmative defenses by a preponderance of the evidence and depriving the defendant of the benefit of said defenses and each of them if thus established.

II

"The defendant excepts to that portion of the Court's charge by which the Court instructed the jury as follows:

"It is further undisputed by the evidence that there was at the same time, engaged on the deck of the vessel, a hatch tender, that [fol. 243] he had previously during that day and immediately prior to the time the plaintiff was injured, had been giving signals or warnings to the men employed in the hold of the vessel of the approach of the slingloads of freight;"

On the ground that said statement is contrary to the facts proven in the case and the prejudicial comment upon the evidence.

## III

"The defendant excepts to that portion of the Court's charge by which the Court instructed the jury as follows:

"If you find from the evidence that the failure to give this signal by the hatchtender was the proximate cause of the injury,—that is, an efficient cause but for which plaintiff would not have been injured,—if that was the proximate cause of the injury and damage to plaintiff, then your verdict must be for the plaintiff."

"On the ground that said instruction is erroneous and contrary to law and particularly that said instruction is contrary to the general maritime law and deprived the defendant of its rights and immunities under that law and under the constitution of the United States.

## IV

"The defendant excepts to that portion of the Court's charge by which the Court instructed the jury.

"I will withdraw from your consideration the questions raised by two of the affirmative defenses: First, as to fellow servant; you are not to consider that in this case, because it is not a defense. Second, neither are you to consider the defense that this was one of the hazards incident to his employment that he assumed; that is not in the case."

[fol. 244] "for the reason that said instruction is contrary to law, is a comment upon the facts of the case, and particularly that said instruction is contrary to the general maritime law and deprived the defendant of its rights and immunities under the general maritime law and the constitution of the United States.

"The defendant further excepts to said portion of the charge on the ground that there was, in the case, evidence from which the jury could have found the defense of fellow servant established under the general law of master and servant as established by the decisions of the Supreme Court of Washington.

## V

"The defendant excepts to that portion of the Court's charge by which the Court instructed the jury that, in computing the amount of damages, if any, to be awarded the plaintiff, the jury should take into consideration the pain and suffering that he (plaintiff) will reasonably undergo in the future."

"on the ground that said portion of the charge is without the scope of the evidence, there being no evidence whatever from which the jury could find that the plaintiff would suffer any pain or suffering in the future."

## VI

"The defendant excepts to that portion of the Court's charge by which the Court told the jury that, in computing the amount of

damages to be awarded the plaintiff, the jury should take into consideration the loss of earnings 'that he (plaintiff) reasonably may sustain in the future,' on the ground that said portion of the charge is without the scope of the evidence, there being no evidence whatever of any probable loss of earnings 'in the future.'

[fol. 245]

## VII

"The defendant excepts to the failure and refusal of the Court to instruct the jury to return a verdict in favor of the defendant as requested by the defendant's requested instruction I on the grounds and for the reasons stated in said requested instruction, and particularly on the ground that the refusal of the Court to grant such request deprived the defendant of its rights and immunities under the general maritime law and the constitution of the United States."

## VIII

The defendant excepts to the failure and refusal of the Court to give to the jury the defendant's requested instruction II, reading as follows:

"You are instructed that a workman cannot hold his employer liable for injuries sustained in whole or in part in consequence of his own negligence. The failure of the workman to take any precautions for his own safety which an ordinarily prudent and careful man similarly situated would take is contributory negligence. A workman in a hazardous employment is not justified in taking for granted that a reasonable prudent and careful man would investigate as a means of self preservation. The failure to observe those things which a reasonably prudent and careful man under similar circumstances would observe amounts to contributory negligence and bars a recovery against the employer. The amount of care a workman is required by law to use for his own protection is proportionate to the dangers of the particular place and situation, the greater the danger the greater the care required."

## IX

"The defendant excepts to the failure and refusal of the Court to [fol. 246] give to the jury the defendant's requested instruction III, reading as follows:

"An experience- workman assumes as part of his employment all the risks and hazards naturally incident to the work in which he voluntarily engages, and if injured in consequence of such risks, he cannot recover against the employer. The employee assumes all the risks and dangers apparent to him and as well all risks and dangers, which in the exercise of reasonable care and caution should become apparent to him. The employer is not required to warn an experienced workman of dangers which would become at once apparent to the workman by the use of his own faculties."

## X

"The defendant excepts to the failure and refusal of the Court to give to the jury the defendant's requested instruction IV, reading as follows:

"If you find that the plaintiff's injury was caused by his own negligence, or by the negligence of the winchdriver or by the concurring negligence of the plaintiff and the winchdriver, it is your duty to return a verdict for the defendant."

## XI

"The defendant excepts to the failure and refusal of the Court to give to the jury the defendant's requested instruction V, reading as follows:

"Even though you should find that the hatch tender was negligent in the performance of his duties, or some of them, still if you believe that the injury to the plaintiff was caused by the subsequent independent negligence of the winch driver, it is your duty to return a verdict for the defendant."

[fol. 247] The foregoing exceptions to the Court's instructions, and to the refusal of the Court to instruct the jury as requested by defendant were called to the attention of the Court at the time of the hearing of defendant's motion for a new trial and before the decision of the Court thereon.

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[fol. 248] IN SUPERIOR COURT OF KING COUNTY

JUDGE'S CERTIFICATE OF STATEMENT OF FACTS—Filed Oct. 31, 1924

I, Calvin S. Hall, one of the Judges of the Superior Court of the State of Washington for King County, and the judge before whom the above entitled cause was tried and determined, do hereby certify:

That the matters and proceedings embodied in the foregoing statement of facts are matters and proceedings occurring in said cause upon the trial thereof, and the same are hereby made a part of the record in said cause.

That said statement of facts contains all of the material facts, matters and proceedings occurring in said cause not already a part of the record herein.

That said statement of facts, together with the Exhibits, set forth all of the testimony introduced upon said trial by the parties thereto, all objections, motions, offers of proof, admissions and the rulings of the Court and the exceptions taken thereto.

That Plaintiff's Exhibits A and B, and Defendant's Exhibits 1 and 2 are all of the exhibits admitted in evidence upon said trial; and the same are hereby made a part hereof, and are directed to be attached hereto and transmitted herewith.

In witness whereof, I do hereby sign, settle and certify the above and foregoing as the statement of facts in said cause on appeal, both parties being present and consenting thereto and concurring therein.

Done in open court this 31st day of October, 1924.

Calvin S. Hall, Judge.

[File endorsement omitted.]

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[fol. 249]

IN SUPREME COURT OF WASHINGTON

[Title omitted]

CLERK'S CERTIFICATE

I, C. S. Reinhart, Clerk of the Supreme Court of the State of Washington, hereby certify that the above and foregoing is a full, true and correct transcript of so much of the record in the above-entitled cause, as I have been directed by præcipe herein to certify to the Supreme Court of the United States, and as now appears of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, this 29th day of September, 1925.

C. S. Reinhart, Clerk of the Supreme Court of the State of Washington. (Seal of the Supreme Court, State of Washington.)

(7960)

## SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 30, 1925

The petition herein for a writ of certiorari to the Supreme Court of the State of Washington is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(8566)



IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1926

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**No. 236**

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INTERNATIONAL STEVEDORING COMPANY,  
A CORPORATION, PETITIONER

*against*

R. HAVERTY, RESPONDENT.

---

ON WRIT OF CERTIORARI TO THE SUPREME COURT  
OF WASHINGTON

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**REPLY BRIEF OF PETITIONER**

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STEPHEN V. CAREY,  
R. E. BIGHAM,  
ALFRED J. SCHWEPPE,

*Attorneys and of Counsel for Petitioner.*

989 Dexter Horton Building, Seattle, Washington.



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No. 236

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1926

---

INTERNATIONAL STEVEDORING COMPANY,  
A CORPORATION, PETITIONER

*against*

R. HAVERTY, RESPONDENT.

---

ON WRIT OF CERTIORARI TO THE SUPREME COURT  
OF WASHINGTON

---

**REPLY BRIEF OF PETITIONER**

---

**PREFATORY STATEMENT**

In this case a writ of certiorari was granted (U. S. Adv. Ops. 1925-6, p. 135) to review the decisions of the Supreme Court of Washington, sitting in Department and *en banc* (134 Wash. 235, 245; 235 Pac. 360; 238 Pac. 581; R. 22, 28). This cause was number 789 of the October term 1925 and has now become No. 236 of the October term 1926. Pursuant to advice from the Clerk, the petitioner has not filed a new opening brief but rests the case on its merits on the brief submitted in support of the petition when originally filed in this court. To the petition and brief the respondent has now filed a brief on

the merits, and the purpose of the present brief is to make a reply thereto.

### STATEMENT OF THE CASE

The facts in this case are essentially without dispute. Perhaps a slightly fuller restatement than has been heretofore made will be helpful. The respondent was a member of one of the stevedoring crews designated by the defendant to load the ship, all of the members of the crew being in the employ of the petitioner. Such a stevedoring crew usually consists of ten to twelve men (R. 78): two dock men who handle the loads on the dock and adjust them in the loading sling; a hatch tender on deck, who when the load is being made up on the dock stands at the rail of the ship to see that everything is all right about the load coming up, and who, when the load is ready on the dock, signals the winchman to raise the load above the ship's rail until the winchman can see it himself, and then walks from the rail of the ship to the edge of the open hatch to see whether everything is all right in the hold below for the next load, and if so he signals the winchman to bring the load over the hatchway and to lower away, at the same time yelling to the stevedores in the hold to look out below; a winchman on deck operating the winch for hoisting the cargo from the dock to the ship and lowering it into the hold through the hatchway; and six men in the interior of the hold stowing away the cargo; and last of all the foreman, known as the "hatchboss," who has charge of the



entire gang, <sup>R. 53)</sup> including the hatchtender, who is but an ordinary member of the crew having a certain portion of the work to perform just like the men in the hold. The hatchboss has charge of only one stevedoring crew; other similarly constituted crews under the general direction of the defendant and each under a different hatchboss work the other hatches of the ship, of which there were eight on the ship in question (R. 73). The respondent at the time of his injury was working with his crew on the number 8 hatch.

The negligence complained of by the plaintiff as alleged in his amended complaint and as sought to be proved at the trial, was that "without any warning or signal or notice of any kind from the hatchtender or anyone else, plaintiff was suddenly struck by a load of wool weighing between twelve hundred and eighteen hundred pounds and injured in the manner and to the extent hereinafter set forth, which injuries resulted directly and proximately from the carelessness and negligence of the hatchtender in failing to give signal of the lowering of the said load of wool" (R. 5). This statement becomes necessary because the respondent (Brief p. 2) in this court for the first time makes the assertion that the negligence of the petitioner consisted of "violation of an agreement with the respondent which prohibited the lowering of a load whilst the men in the open hatchway were stowing away a previous load." There is neither pleading nor proof to that effect in the record, nor has such claim been heretofore made in this case, nor is such claim referred to by the Supreme

Court of Washington, which fully states the facts. There is no allegation or testimony of any agreement between the parties concerning the giving of signals. What the respondent pleaded and relied on at the trial was the failure to give the customary warning of the descent of the load. The action as brought by the respondent is not one for breach of contract but for negligence. Possibly the respondent means to say no more than this when he states that the "*negligence* of the petitioner" consisted of "violating an agreement." Moreover, the respondent predicates his whole argument on tort liability and frankly concedes that "the *tort* is maritime in nature, and liability should be judged by maritime standards" (Brief p. 2).

## ARGUMENT

The respondent's much subdivided and interesting brief may be reduced to, and answered as, the following propositions:

1. That, entirely apart from any statute, the maritime law as administered by the Federal courts (which respondent frankly concedes is controlling) in the specific case here involved, *should be* other and different from that contended for by the petitioner, and as it has been laid down by the Federal courts over a long period of years.

2. That if the fellow-servant rule has been heretofore properly applied by the maritime courts in stevedoring cases in the manner petitioner contends, it was impliedly abrogated by the Jones Act which declared a new public policy with reference to "seamen."

In support of the first proposition, the respondent, without as much as mentioning or seeking to differentiate the admiralty cases exactly in point on the same state of facts cited in the petitioner's brief, contends that the view of the Federal courts sitting in admiralty is not sufficiently enlightened, and that the rule should be otherwise. In the course of his argument the respondent cites certain Federal cases which will be analyzed in this reply brief, and which will be shown not to be in point.

In support of the second proposition the respondent contends, not very vigorously, that while the Jones Act applies in terms only to "seamen" and not to maritime workers such as stevedores who take no part in the duties of navigation, still since that statute

abrogates the fellow-servant rule as to "seamen," this court, even in the absence of a legislative declaration, should abrogate the fellow-servant rule as to stevedores. This contention will be shown to be contrary to the Federal cases expressly ruling on this point. Moreover, the upholding of this contention would require this court without the aid of legislation, to abrogate the fellow-servant rule in stevedoring cases contrary to the principle laid down in *Beutler v. Grand Trunk Ry.*, 224 U. S. 85, where the court, speaking through Mr. Justice Holmes said:

"The doctrine as to fellow-servants may be, as it has been called, a bad exception to a bad rule, but it is established, and it is not open to courts to do away with it upon their personal notions of what is expedient."

# I.

UNDER THE MARITIME LAW THE FAILURE OF THE HATCHTENDER OR SIGNALMAN IN A SINGLE INSTANCE TO GIVE CUSTOMARY WARNING TO THE STEVEDORES IN THE HOLD BEFORE THE NEXT LOAD COMES DOWN IS THE NEGLIGENCE OF A FELLOW-SERVANT IN CARRYING OUT AN OPERATIVE DETAIL.

In the brief filed in support of the petition this petitioner has set out the admiralty cases exactly in point on the same state of facts supporting the contention of this petitioner. These cases are from the 9th Circuit, the 5th Circuit, and the 2nd Circuit, and are absolutely uniform in supporting the petitioner's contention. Since the writ was granted in this case the Circuit Court of Appeals for the 9th Circuit has

rendered another decision which fully supports the contention of your petitioner on the same state of facts.

*Carstensen v. Hammond Lumber Co.*, 11 F. (2d) 142.

Two state cases exactly in point are,

*Ocean Steamship Co. v. Cheney*, 86 Ga. 276, 12 S. E. 351;

*Hortense v. Coal Co.*, 101 Wis. 574, 77 N. W. 875.

Moreover, it is pointed out in the brief in support of the petition that, in addition to the Federal courts sitting in admiralty, the Federal courts sitting at common law, including this court, have uniformly decided the specific question here involved in favor of your petitioner.

As a matter of fact the wholly isolated status of the rule laid down by the Supreme Court of Washington in this case is well described in Labatt, Master and Servant (2d Ed.), Sec. 1537, as follows:

"Frequent attempts have been made to bring the negligence of servants deputed to give signals within the scope of the principle that the duty to maintain a safe place of work is non-delegable. But this contention is rejected, *except in Washington*, where a servant who has been designated to give signals which control the movements of machinery, is, while so acting, held to be doing the work of the master."

Indeed the Supreme Court of Washington, in a later case than the present one, recognizes its isolated position on the point here in question. In *Reynolds*

*v. International Stevedoring Co.*, ..... Wash. ...., 245 Pac. 1, the court says (p. 2) :

“Indeed, we seem to be classed by Mr. Labatt as standing alone with respect thereto (Labatt, Master and Servant (2d Ed.) § 1537).”

The petitioner thus having the uniform support of Federal courts for its position and the uniform support of the courts elsewhere except in the State of Washington, as said by Mr. Labatt, it remains only to reply briefly to those cases which the respondent asserts support his position. In general, it may be said that none of the cases cited by the respondent are in point on the question here involved. Without, however, analyzing each one of the many cases cited by the respondent, it will only be attempted in this argument to analyze briefly the cases from this court which the respondent claims support him.

The respondent (Brief pp. 4, 27) cites *Union Pacific v. Fort*, 17 Wall. 553. That case is not at all in point. It relates solely to the failure to warn a youthful servant of peril in a matter outside of the servant's usual employment. The general non-delegable duty of a master to give general instructions and general warning at least once to inexperienced or youthful servants when sending them for the first time to work in a place and with appliances which are safe for experienced workmen, but which may be dangerous for the inexperienced, must not be confused with the duty of the master with reference to work in the course of which working signals from one servant to another become necessary from time to time as a detail of the work (*Maine and N. H.*

*Granite Co. v. Hatchey*, 173 Fed. (C. C. A.) 785). The master's duty in such a case, according to the unanimous opinion of the Federal courts in both admiralty and common law cases, is to furnish a competent fellow-servant to carry out this operative detail of giving warning signals from time to time as they become necessary; and in the absence of proving that the master was negligent in his selection of the servant designated to carry out that detail of the operation, the master is not liable in case of damage from negligence in that regard.

The next case cited by the respondent (Brief pp. 4, 27) is *Wabash v. McDaniel*, 17 Otto. 454. There was no question of the negligence of fellow-servants in that case. The case deals solely with the amount of care a master must exercise in the selection and retention of co-employees. The negligence there charged was negligence of the master in selecting and retaining fellow servants. That question is not in the present case because it is undisputed that the hatchtender whose duty it was to give the signals was a competent fellow servant.

*Mather v. Rillston*, 156 U. S. 391, also cited by the respondent (Brief pp. 4, 27), is another case relating to an inexperienced servant, to a youth who had never been advised of danger. The case is like *Union Pacific v. Fort*, *supra*, 17 Wall. 553, and is disposed of with the argument made in connection with the latter case.

*Santa Fe v. Holmes*, 202 U. S. 438, cited by the respondent (Brief pp. 4, 27) is not in point at all. There is no question of warning in the case. The

court held that the negligence of the railroad there consisted in wrongly administering the system of keeping trains in relation. Counsel say (Brief p. 27) that *Santa Fe v. Holmes*, *supra*, overrules *Northern Pacific v. Dixon*, 194 U. S. 339, cited by petitioner. The statement is unwarranted because the court does not expressly undertake to overrule nor does it impliedly overrule *Northern Pacific v. Dixon*. The distinction between the two cases is obvious.

Respondent (Brief pp. 4, 28) also cites *Kreigh v. Westinghouse*, 214 U. S. 249. Far from supporting the position of the respondent, that case supports the position of the petitioner as is demonstrated by the analysis of that case made in the brief supporting the petition, pp. 38-39. This court there held that the employer was not liable for the failure to give a warning signal in the course of operation because it was the negligence of fellow servants, but held there was also evidence of defective machinery; and that there was, therefore, a question for the jury whether the injurious effect of the derrick "was not attributable to faults of construction and equipment *as well as to negligent operation at the time of the injury.*" The court held that while the employer was not liable for the negligence of the fellow servants in pushing the bucket against the plaintiff without warning, it might be liable for negligence in the construction and equipment of the derrick if that negligence contributed to the cause of the injury.

In *Standard Oil Co. v. Brown*, 218 U. S. 78, cited by respondent (Brief pp. 4, 28), the charge was that the defendant never told the plaintiff of a hole in



the loft through which bailed straw was tossed. The servant was utterly ignorant of the existence of the hole or of the likelihood that anything might be thrown through it. The court held it to be the employer's "duty to inform those whose employment made it necessary to be in the stable, of the danger to them of the use to which the hole was put. \* \* \* If plaintiff had had knowledge of the situation and its dangers he might have needed no warning from Coleman and might have been protected by the care which such knowledge would have induced." The case was held to be one for the jury. The present case is entirely different and deals solely with the failure of one member of a stevedoring crew to give the usual working signal to another member of the stevedoring crew who is fully experienced and is cognizant of all the details of the physical situation in which he is working.

*McGovern v. Philadelphia*, 235 U. S. 389, and *Reed v. Director General*, 258 U. S. 92, cited by respondent (Brief p. 7) have no application here. They both arise under the Federal Employer's Liability Act which abolishes the fellow-servant rule and leaves open only the question of defense of assumed risk, which question was held to be for the jury.

*Brown v. Pacific Coast Coal Company*, 241 U. S. 571, likewise cited by the respondent (Brief p. 7) is not in point. It relates solely to the duty of a Federal court to follow a local rule relating to inspection under a state statute.

*Atlantic Transport Company v. Imbrovek*, 234 U. S. 52, cited by respondent (Brief p. 8) relates to the

failure of an employer to furnish a safe place to work and is not in point here. The negligence there charged was the failure to pin down loose hatch covers.

*Standard Oil Company v. Anderson*, 212 U. S. 215, cited by respondent (Brief p. 8) is not in point. The question there was whether persons on the same job, not employed by the same master, are fellow-servants. This court held that they were not. That was the only question decided.

*Miller's Indemnity Underwriters v. Brand*, decided February 1, 1926, U. S. Adv. Ops. 1925-6, page 211, referred to by respondent (Brief p. 14) is not in point. The court there expressly reaffirms that the law relating to stevedores injured upon navigable waters is beyond the regulatory power of the state.

The case of *St. Louis v. Jeffries*, 276 Fed. 73, cited several times by the respondent, is entirely different from the case at bar. There was no question of fellow servant in the case. The case arose under the Federal Employers' Liability Act which abolishes the fellow-servant rule. The sole question there at issue was whether a custom existed to give working signals. If the custom existed it was held to be the duty of the master to provide for the giving of signals, and that if the master failed to make provision for signals, where it was the custom of the business, he would be liable. Whether such custom existed was held to be a question for the jury. In the present case it is conceded that the master selected a competent hatch-tender to give the signals, so that the question involved in *St. Louis v. Jeffries*, *supra*, is not in the present case.

The length to which counsel are required to go to sustain their position is demonstrated by a statement (Brief p. 30) that the railroad cases cited by the petitioner (which are exactly in point on the same state of facts involved in the present case) must be disregarded as not being in conformity with present public policy. The doctrine of those cases, while now changed by the adoption of the Federal Employers' Liability Act, which eliminates the fellow-servant rule, does represent the law of master and servant as administered by the Federal courts in the absence of statute. Those cases contain the mature reflections of this court upon liability for negligence and are therefore precisely in point in all similar cases that are unaffected by the enactment of any statute.

Exactly the same answer applies to respondent's argument (Brief p. 43) that the Jones Act has "by implication" done away with the admiralty cases in which this court applies the fellow-servant rule, and made them "contrary to the dictates of public policy" in cases wholly unaffected by statute.

The respondent likewise (Brief p. 37) indulges in a severe, and we believe wholly unwarranted, criticism of the decisions of the Circuit Court of Appeals for the Ninth Circuit with reference to the fellow-servant doctrine. This criticism is doubtless induced by the fact that the cases of *The Hoquiam*, 253 Fed. 627, and *Carstenson v. Hammond Lumber Company*, 11 Fed. (2d) 142, both cases exactly in point here, were both decided by the Circuit Court of Appeals for the Ninth Circuit. However, not only are those decisions correct; but the same result on the same

state of facts was reached by the Circuit Court of Appeals for the Fifth Circuit in *Gulf Transit Company v. Grande*, 222 Fed. 817 (heretofore cited in petitioner's brief) and by Circuit Judge Morrow of the Second Circuit in *The Cedric*, 299 Fed. 815.

In the ultimate analysis the respondent's position on what the maritime law should be with reference to the doctrine of fellow-servant in the specific state of facts here involved, would require this court to upset the settled and accepted decisions of the Federal courts over a long period of years—decisions which have been rested, and rightly so, upon the law as laid down by this court—and would likewise require this court to wipe out a large number of its own prior decisions containing the considered judgment of this court on analogous facts where the failure of a co-worker during the course of operation to give the customary warning signal in a single instance to the damage of another servant was held to be the negligence of a fellow servant, and that the master was not liable on the theory that he had failed to furnish a safe place to work or safe appliances (petitioner's brief, pp. 21, 35).

## II

## THE JONES ACT HAS NO BEARING ON THE PRESENT CASE

The respondent argues, not very strenuously, that since the Jones Act abolishes the fellow-servant rule as to "seamen" by importing the provisions of the Employers' Liability Act, the policy of the law has been so changed as to require this court, even in the absence of a statute, to wipe out the fellow-servant doctrine in the case of maritime employees who are not "seamen," to-wit, stevedores. A brief twofold answer can be given to this argument.

In the first place, counsel for the respondent in addressing the trial court in this case said (R. 151):

"I might call your attention to this fact that a stevedore is not a seaman. \* \* \* And I can answer that immediately by saying that he [the stevedore] has never been considered a seaman and that he is not a seaman."

If a stevedore is not a seaman, then, adopting counsel's own quoted statement, the abolition of the fellow-servant rule as to "seamen" does not abolish it as to stevedores.

In the second place, it has been held in carefully considered cases that the Jones Act which applies to "seamen" in no way affects the fellow-servant doctrine in cases relating to longshoremen who are not "seamen" and have nothing to do with the navigation of the vessel.

*Cassil v. United States Emergency Fleet Corporation* (C. C. A.), 289 Fed. 774;

*The Hoquiam* (C. C. A.), 253 Fed. 627;

*Grimberg v. Admiral Oriental Line*, 300 Fed. 619, 620;

*Martis v. Union Transfer Company*, 202 N. Y. Supp. 56, citing *Ellis v. U. S.*, 206 U. S. 246.

In *Washington v. Dawson & Company*, 264 U. S. 219, 227, this court suggested that Congress might enact a general employer's liability law containing provisions for compensating injured stevedores, expressly recognizing that there was not at that time, just as there is not now, a statute of Congress relating to personal injuries of stevedores and other maritime workers who are not seamen.

### III

#### REPLY TO BRIEF OF AMICI CURIAE

Petitioner has just been served with a somewhat extended brief by friends of the Court signed by Arthur Griffin, George F. Vanderveer, and S. B. Bassett. This argument may be very briefly answered. These counsel, while seeking to sustain the judgment below, take a position diametrically opposed to the respondent's, in that they claim that the present case is not governed by the maritime law, and that the state court has the right to apply peculiarly local rules to personal injury cases arising on navigable waters, whereas the respondent frankly concedes (Brief p. 2) "that the tort is maritime in nature, and liability should be judged by maritime standards." The argument of the *amici curiae* may be disposed of by the citation of the following cases:

*Southern Pacific v. Jensen*, 244 U. S. 205;

*Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149;

*Chelentis v. Luckenbach Steamship Co.*, 247 U. S. 372;

*Great Lakes Dredge and Dock Co. v. Kierejewski*, 261 U. S. 479;

*Washington v. Dawson & Co.*, 264 U. S. 219;

*Robins Dry Dock & Repair Co. v. Dahl*, 266 U. S. 449.

In *Chelentis v. Luckenbach Steamship Company*, *supra*, 247 U. S. 372, this court held that state courts in deciding admiralty cases must apply the rules of the admiralty law and not the local common law rules. This doctrine was reaffirmed in *Carlisle Packing Company v. Sandanger*, 259 U. S. 255.

In *Robins Dry Dock & Repair Co. v. Dahl*, *supra*, 266 U. S. 449, the court said:

"The jury were distinctly told that they might consider the provisions of the local law in deciding whether or not the employer was negligent. *No such instruction would have been permissible in an admiralty court, and it was no less objectionable when given by the state court. The error is manifest and material.*"

In *Southern Pacific v. Jensen*, *supra*, 244 U. S. 205, the court said (p. 215):

"In the absence of some controlling statute the general maritime law as accepted by the Federal Courts, constitutes part of our national law, applicable to matters within the admiralty and maritime jurisdiction."

In *Knickerbocker Ice Co. v. Stewart*, *supra*, 253

U. S. 149, the court held (p. 160) that the Federal constitution in adopting the maritime law,

“took from the states all power, by legislation or *judicial decision*, to contravene the essential purpose of, or to work any injury to characteristic features of such law or to interfere with its proper harmony and uniformity in its international and interstate relations.”

The argument of the *amici curiae* is predicated largely upon statements found in the dissenting opinions in *Southern Pacific v. Jensen* and *Knickerbocker Ice Company v. Stewart*. Those dissents have, however, not become the law of this court.

A conclusive answer to the argument of the *amici curiae* is found in the last paragraph of *Washington v. Dawson & Company*, 264 U. S. 219, a stevedoring case, where this court said (p. 228):

“Of course some within the states may prefer local rules; but the union was formed with the very definite design of freeing maritime commerce from intolerable restrictions incident to such control. The subject is national. Local interests must yield to the common welfare. The constitution is supreme.”



#### IV CONCLUSION

The present case is one which, unhampered by any controlling statute, must be decided pursuant to the fundamental principles of law governing the relation of master and servant as laid down by the Federal courts over a long period of years. The master's duty is one of reasonable care; he is liable for negligence only; he is not an insurer. The duty which he cannot delegate is the duty to exercise reasonable care. Performance of a non-delegable duty does not mean a guarantee of safety but means the exercise of reasonable care. How does a master exercise reasonable care with reference to the giving of working signals during the progress of the work? The master under the uniform Federal decisions and, according to Labatt on Master and Servant, (2d Ed.) Section 1537, under the uniform decisions elsewhere *except in the State of Washington*, exercises reasonable care by providing a competent fellow servant to give the signals during the progress of the work. In the nature of things, the master, in the exercise of reasonable care, cannot do more. The applicable rule is stated by this court in *Northern Pacific R. R. Co. v. Dixon*, 194 U. S. 338, as follows (p. 346) :

“Before an employer should be held responsible in damages it should appear that in some way, by the exercise of reasonable care and prudence, he could have avoided the injury. He cannot be personally present everywhere and at all times and, in the nature of things, cannot guard

against every temporary act of negligence by one of his employees."

In *Kreigh v. Westinghouse*, 214 U. S. 249, this court said (p. 256):

"The master is not held responsible for injuries resulting from the place becoming unsafe through the negligence of a workman in the manner of carrying on work, where he, the master, has discharged his primary duty of providing a reasonably safe place for his employees to carry on the work, nor is he obliged to keep the place safe at every moment so far as such safety depends on the due performance of the work by the servant and his fellow servants."

In the present case the undisputed facts show that the master provided a safe place, a safe winch, and a competent fellow-servant to give the working signals to the stevedores in the hold each time a load came down. The undisputed facts show no liability whatever for negligence.

It is submitted that the decision of the majority of the Supreme Court of the State of Washington in this case utterly destroys the harmony and uniformity of the admiralty law which is required by the Constitution of the United States and which is firmly established by this court in many decisions. *Knickerbocker Ice Co. v. Stewart*, 253 U. S., 149; *State of Washington v. Dawson & Co.*, 264 U. S. 219; *Robins Dry Dock and Repair Co. v. Dahl*, 266 U. S. 449, and cases there cited. The incongruous condition now existing is that if a plaintiff, on the precise evidence here involved, brings his action in the Federal court in Seat-

tle, Washington, the defendant will, under the admiralty decisions of the Circuit Court of Appeals for the Ninth Circuit and the uniform holdings of the Federal courts sitting in admiralty elsewhere, prevail as a matter of law, on the ground that the negligence of a hatchtender, gangwayman, or signalman in failing, in a single instance, to give the customary working signal to the stevedores in the hold of a vessel that the next load is coming down, is the negligence of a fellow-servant in carrying out an operative detail, and that the master is not liable on the theory that he has failed to furnish a safe place to work or safe appliances. On the other hand, if the same plaintiff should bring his action, on the same state of facts, *in the State court* in Seattle, Washington, the defendant, under the decision of the Supreme Court of Washington in this case, is utterly deprived of the defense of a fellow-servant given him by the maritime law, since the failure of the hatchtender, in a single instance, to give the customary warning signal to the stevedores in the hold that the next load is coming down, is held by the Supreme Court of Washington in this case, in its avowedly novel decision upon the maritime law, to be the negligence of the master in failing to provide a safe place to work, and not the negligence of a fellow-servant. The decision of the Supreme Court of the State of Washington in this case deprives your petitioner and all others similarly situated of a defense clearly granted by the admiralty law and the Constitution of the United States as interpreted by the Federal courts, introduces a conflicting local rule, and destroys the harmony and

uniformity which should prevail in the admiralty law throughout every part of the Union, whether applied by the State or Federal courts.

As pointed out in the brief in support of the petition, the trial court and the Supreme Court of Washington erred in refusing to direct a verdict for your petitioner on the ground that it conclusively appeared from the evidence that the injury of the respondent was caused by fellow-servants. Under all the Federal authorities, both in admiralty and at common law, the petitioner is entitled to have the present action dismissed because the evidence fails to prove any liability whatsoever.

Moreover, the trial court instructed the jury that if they found that the hatchtender's failure to give the working signal in the single instance in question was the proximate cause of the injury, they must render their verdict against the petitioner and for the respondent. This is an error of law which if there were any other evidence to support a claim of liability of the petitioner, would merely require a new trial. But since under the authorities the evidence is insufficient to make out a case of liability, the judgment of the Supreme Court of Washington and of the trial court should be reversed with directions to dismiss the action.

The same statement may be made with reference to the instruction of the trial court who *expressly withdrew from the consideration of the jury entirely the defense of fellow-servant, stating that it was not a defense*. If there were other evidence of liability this instruction would merely require a new trial, but

in view of the fact that there is no evidence to create any legal liability, the respondent's action should be dismissed. The same argument applies to the refusal of the trial court and of the Supreme Court of Washington to grant petitioner a judgment notwithstanding the verdict. On account of such failure the judgment should be reversed with directions to dismiss the action.

We respectfully urge upon this Honorable court that the judgments of both the trial court and of the Supreme Court of Washington are erroneous, and should be reversed on the ground that no liability on the part of your petitioner is shown and directions given to dismiss the action.

Respectfully submitted,

STEPHEN V. CAREY,

R. E. BIGHAM,

ALFRED J. SCHWEPPE,

*Attorneys and of Counsel for Petitioner.*

Office Supreme Court, U. S.  
F. I. L. B. D.

NOV. 25 1926

WIL. H. STANBURY  
CLERK

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1926

---

**No. 236**

---

**INTERNATIONAL STEVEDORING COMPANY,  
A CORPORATION, PETITIONER**  
against  
**R. HAVERTY, RESPONDENT.**

---

**ON WRIT OF CERTIORARI TO THE SUPREME COURT  
OF WASHINGTON**

---

**PETITION FOR REHEARING**

---

**STEPHEN V. CARRY,  
R. E. BIGHAM,  
ALFRED J. SCHWEPPE,**  
*Attorneys and of Counsel for Petitioner.*

**989 Dexter Horton Building, Seattle, Washington.**

IN THE  
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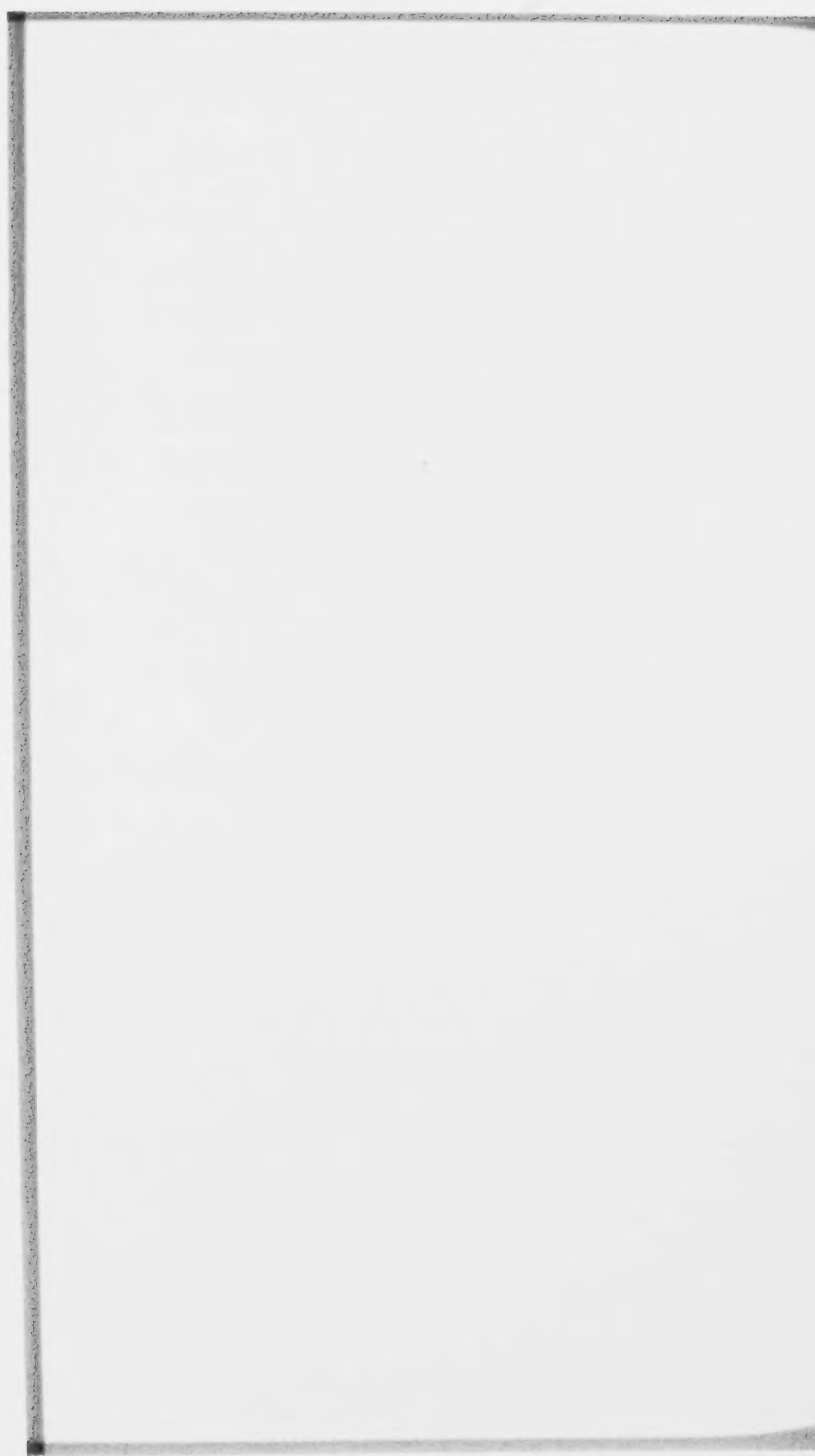
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*Attorneys and of Counsel for Petitioner.*  
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THE STATE OF WASHINGTON

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**PETITION FOR REHEARING**

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TO THE SUPREME COURT OF THE UNITED STATES AND  
THE HONORABLE JUDGES THEREOF:

The petitioner respectfully applies to this Honorable Court for a rehearing in this cause. The opinion was filed on October 18, 1926, and is reprinted in the Appendix hereto.

We are not ordinarily disposed to file a petition for rehearing and to burden this already overburdened court with a recital of our private disappointments. Moreover, we are appreciative of the fact that such

petitions are, and of right ought to be, rarely granted. However, the opinion in this case has caused such nationwide consternation among the maritime bar, and has so completely unsettled all fixed notions of what the law is, and will bring such an increased flood of maritime litigation to this court to again define the lines which by this opinion are obliterated, that we feel it our duty, first, to this Court, and, second, to the members of the maritime bar of the United States, whose many telegrams of consternation lie before us, to state briefly the matters wherein we consider the opinion open to question, and what its consequences are and will be.

A brief statement of our reasons (each of which is more fully developed in the appended brief) now follows:

#### I.

The opinion of the Court, in seeking the intent of Congress, overlooks the contrary construction made by Congress itself.

The Merchant Marine Act amending the Seamen's Act of 1915 was passed in 1920 and relates to merchant seamen. In 1922 Congress, as the result of the decision in *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149, sought for a second time to give stevedores and other maritime workers statutory protection by amending sections 24 and 256 of the Judicial Code by saving to "claimants for compensation for injuries to or death of persons *other than the master or members of the crew* of a vessel their rights and remedies under the Workmen's Compensation Act of any state." The master and the members of the crew

of a vessel were excluded, because already protected under the Merchant Marine Act of 1920. Says the report of the Senate Judiciary Committee on the amendment of June 10, 1922 (S. Rep. No. 94, 67th Congress, 1st Session, found in Serial Vol. No. 7918):

"There is a clear distinction between the two classes, seamen and landsmen, who work in and about ships. \* \* \* The special treatment which seamen have always had under the acts of Congress was recently emphasized by the provision of the Merchant Marine Act of 1920 extending to seamen, *but not to other maritime workers*, the same rights of recovery in the case of work accidents now enjoyed by interstate railway employees \* \* \* longshoremen, and ship repair men are land workers, subject neither to the peculiar conditions nor to the laws which regulate seamen. \* \* \* *The peculiar maritime law applying to seamen is inapplicable to their conditions and no attempt has been made to apply it to them.*"

And the report of the House Judiciary Committee on the same law (H. Rep. No. 639, 67th Congress, second session, found in Serial Vol. No. 7955) says:

"Congress has always in legislating distinguished between these port workers and seamen. It has assumed full control over the relation of master and servant at sea. Federal legislation determines the character of the quarters in which the crew is to be housed, the food to be served them, hours of labor, reciprocal duties of seamen and officer. \* \* \* His right to recover damages

was strictly limited by the law of the sea, but Congress in the Merchant Shipping Act of 1920 gave him a wide right to recover damages, putting him on a basis with the employees in interstate commerce. Congress has hitherto left to state control the relation of master and servant in longshore work or in ship repair."

These reports, written in 1921 and 1922, show that Congress has always understood the word "seamen" in its ordinary sense and has at no time had the faintest intention of including stevedores within the word "seamen", but, conscious of the fundamental differences in their situation, it has legislated differently with respect to each of them. The very act which Congress passed to protect stevedores and other maritime workers, expressly excluding "the master and the members of the crew of a vessel," was held invalid by this Court in *Washington v. W. C. Dawson & Co.*, 264 U. S. 219. The reason, therefore, that stevedores are unprotected by statute today (or were, until the present decision) is that the very act which Congress designed to protect them was held invalid by this court, and that the gap in statutory protection which has by all Courts and by all maritime lawyers and by Congress itself been considered to exist as to stevedores and other maritime workers not seamen, was created by this Court itself. That this has been a uniform construction of Congress is borne out further by the two acts introduced in the last session (69th Congress, First Session) being H. R. 12063 and S. 3170, each entitled "Longshoremen's and Harbor Workers Compensation Act," and the

reports of the judiciary committees of both houses (H. Rep. No. 1190, 69th Congress, first session; S. Rep. No. 936, 69th Congress, first session) show that Congress has been persistently trying to fill a gap in the statute law (of the existence of which it was for the third time by this court expressly advised in the Dawson decision) and has constantly construed the Merchant Marine Act of 1920 differently from this Court and has always accepted the word "seamen" in its well understood and usual sense. Thus the opinion of the court in this case is squarely contrary to the uniform expressed intent and construction of Congress itself. The gap which Congress has twice tried to fill without success has now been filled by the court itself.

## II.

The opinion of the court overlooks the fact that the seamen's act of 1915 was interpreted by the Circuit Court of Appeals in *The Hoquiam*, 253 Fed. 627 (October 28, 1918) not to include stevedores, and that Congress in the Act of 1920 accepted that definition by amending the act without changing the judicial interpretation theretofore placed upon the statute. Hence according to the ordinary rule of statutory construction, often applied by this court, the amended act of 1920 must be construed in the light of the construction originally placed upon it, namely: that the term "merchant seamen" does not include "stevedores."

## III.

The decision in this case strikes the word "election" from Section 33 of the Merchant Marine Act, at least as to stevedores, and thereby defeats the intent of Con-

gress. In *Panama R. R. Co. v. Johnson*, 264 U. S. 375, Section 33 was held valid solely because it gave a seaman the "election" between two systems of maritime law, *i. e.*, either an election under the old rules granting him compulsory compensation, regardless of negligence, in the form of wages to the end of the voyage and maintenance and cure, or an election to proceed under the new rules imported into the admiralty law by the incorporation of the principles of the Federal Employers' Liability Act. That was the sole basis on which the statute was sustained. The Court said: "Rightly understood, the statute \* \* \* extends to injured seamen a right to invoke, at their election, either the relief accorded by the old rules, or that provided by the new rules. The election is between alternatives accorded by the maritime law." A stevedore has never had an "election" to proceed according to the "old rules" relating to a "seaman" and granting him "wages to the end of the voyage and maintenance and cure," and, therefore, a stevedore has no "election" of substantive maritime theories of recovery under Section 33 of the Merchant Marine Act. Thus the construction of the court in this case, at least as to stevedores, strikes the word "election" from the statute. Manifestly, when Congress used the word "election" in Section 33, Congress intended to cover only persons who would have an "election" to proceed either under the old rules or the new rules of the maritime law, and not persons who had no such "election" whatsoever, such as stevedores, boiler makers, dry dock workers, repair men, watchmen, painters, plumbers, and carpenters.

## IV.

The construction placed upon the word "seamen" by the opinion of the court results in ascribing to Congress an intent to discriminate which it cannot be presumed Congress ever had, and which is contrary to its settled practice.

The opinion rests upon the ground that the work of stevedores was in early time done by seamen and that the Court "cannot believe that Congress willingly would have allowed the protection to men engaged upon the same maritime duties to vary with the accident of their being employed by a stevedore rather than by the ship."

What then of the repair men, boiler workers, dry dock workers, upholsterers, painters, and carpenters, who are also maritime workers, when working on navigable waters, but are clearly not seamen? Can it be assumed that Congress "willingly" included within the word "seamen" one class of workers who are not strictly seamen (such as stevedores), and "willingly" excluded other maritime workers who are not strictly "seamen" (such as the boiler makers, repair men, and the like)? The very fact that the construction adopted by the Court in this opinion would ascribe to Congress an intent to protect one class of maritime workers not strictly seamen, but to exclude another class of maritime workers not strictly seamen, shows that the construction is in itself a questionable one. If Congress intended to include more in the word "seamen" than just merchant seamen in the ordinary sense, then this Court must go the full distance and hold all maritime work-

ers to be within the protection of the "Seamen's" Act even though they perform maritime duties which seamen never perform. The Congressional legislation shows that with respect to maritime workers other than seamen, Congress has always included all in the same legislation; and, therefore, to ascribe to Congress an intent to protect one class of maritime workers not strictly seamen, but to exclude another class of workmen not strictly seamen, is to ascribe to Congress an intention that Congress never had, and one that is contrary to its uniform practice with relation to the particular subject matter.

## V.

The opinion of the Court overlooks the consequences of the decision announced, in that it brings death actions of the stevedores under the Merchant Marine Act of 1920, contrary to the received opinion on that subject. The result of the decision is that all death actions of stevedores, repair men, and other maritime workers not seamen, which have heretofore been brought under state death statutes supplementing the maritime law under the rule of *Western Fuel Co. v. Garcia*, 257 U. S. 233, have been erroneously brought. If the present opinion is correct, the supplement to the maritime law in the form of state death statutes was superseded by the supervening uniform act of Congress in Section 33 of the Merchant Marine Act of 1920 (it has this effect as to seamen—*Engel v. Davenport*, U. S. Adv. Ops. 1925-26, p. 424). The result is that judgments in all such actions thus brought, are erroneous and without jurisdiction, and



that in many cases the statute of limitations prevents a new action being commenced under the Act of 1920.

## VI.

The opinion in the present case overlooks other consequences. If the decision in this case is correct, bringing personal injury and death actions of stevedores, and presumably of other maritime workers, under the Merchant Marine Act of 1920, then Congress, having exercised its power, and having thus eliminated state laws from the field, exclusively occupies the field. This result requires an overruling of the decisions of *Miller Indemnity Underwriters v. Braud*, U. S. Adv. Ops. 1925-6, p. 211; *Grant-Smith Porter Ship Co. v. Rohde*, 257 U. S. 469, which are all predicated on state statutes supplementing the admiralty law in the absence of a supervening uniform act of Congress. If the decision in the present case is correct, then the many admiralty cases that have been decided in recent years on the theory of state statutes permissibly supplementing the admiralty law in the absence of a supervening uniform act of Congress, have been erroneously decided because the fact has been completely overlooked that Congress has occupied the field.

## VII.

The opinion of the Court overlooks the language and effect of the decision in *Washington v. Dawson & Co.*, 264 U. S. 219, a stevedoring case, where the court said: "This power [of Congress], we think would permit the enactment of a general employers' liability law, or general provisions for compensating injured employees." (It has already been pointed

out that Congress has undertaken to act upon this invitation) The *Dawson* case was argued on January 8, 1924, one month after *Panama RR. Co. v. Johnson* was argued, which was argued December 7, 1923. Since the court at the time of deciding the *Dawson* case had before it for consideration the Merchant Marine Act of 1920 relating to "seamen," the statement in the *Dawson* case that the Constitution gave Congress power which "*would permit* the enactment of a general employers' liability law" for stevedores indicates that this court did not at the time of the *Dawson* decision entertain the view that "stevedores" were included in the Merchant Marine Act of 1920 relating to "seamen." This must necessarily be true, because, if the provisions of the Seamen's Act applied to stevedores, there was already a "general employers' liability law" in the field, and the decision in the *Dawson* case should have turned on how far Congress could let state laws apply in a field *already* exclusively occupied by Congress with a "general employers' liability act."

#### VIII.

The opinion of the Court overlooks that Congress in the Merchant Marine Act of 1920 expressly mentions both stevedores and seamen. In Section 30 of the Act of 1920 the lien of "stevedores" is twice mentioned in express terms. Since Congress, therefore, in the same act expressly used both the term "stevedores" and the term "seamen," it is violating an elementary rule of construction to say that whenever Congress used the word "seamen" it intended to include "stevedores."

## IX.

The opinion of the Court overlooks the ordinary rule of construction that words and phrases in a statute must be construed with regard to the statute as a whole so as to make a harmonious and uniform result. The construction given by the court to the word "seamen" in this opinion cannot in the nature of things be applicable to the word "seamen" wherever used elsewhere in the Seamen's Act, which relates to "seamen's" wages, hours of labor, food, flogging, and the like. Since the word "seamen" as used in the other sections of the Merchant Marine Act of 1920 cannot possibly be construed to include stevedores, that same meaning must be given to the word "seamen" in Section 33 because Congress is presumed to have intended a harmonious interpretation of the whole act.

## X.

The opinion of the Court overlooks the rule of construction that words must be given their ordinary meaning. Congress is presumed to have intended to use language in its ordinary meaning unless it would manifestly defeat the object of its provisions. *Minor v. Mechanics Bank*, 1 Pet. 46. A statute should be read according to the nature and obvious import of its language, without resorting to subtle and forced construction for the purpose of either limiting or extending its operations; and when the language is plain, words or phrases should not be inserted so as to incorporate in the statute a new and distinct provision. *U. S. v. Temple*, 105 U. S. 97, and see application of this same rule to the Seamen's Act in *O'Hare*

*v. Luckenbach S. S. Co.*, U. S. Adv. Ops. 1925-6, p. 160, where the Court said:

"In this conclusion we are fortified by the consideration that the legislation deals with seamen and the merchant marine and, consequently the phrase \* \* \* is to be given the meaning which it had acquired in the language and usages of the trade to which it relates."

The opinion of the Court in the case avowedly stretches the meaning of the word "seamen" without regard to the context in which it is used and without regard to its ordinary and received meaning.

# XI.

The opinion of the Court overlooks, without discussion, the uniform contrary decisions of the lower courts, where the question was considered with much deliberation.

*Cassil v. U. S. Emergency Fleet Corp.* (C. C. A.), 289 Fed. 774;

*The Hoquiam* (C. C. A.), 253 Fed. 627;

*Young v. Clyde Steamship Co.* (D. C.), 294 Fed. 549;

*Grimberg v. Admiral Oriental Line*, 300 Fed. 619;

*Johnson v. American-Hawaiian Steamship Co.*, 14 Fed. (2d) 534;

*The Steel Age*, 1923 A. M. C. 348;

*Carstensen v. Hammond Lumber Co.*, 11 Fed. (2d) 142;

*Martis v. Union Transfer Co.*, 202 N. Y. Supp. 56 (App. Div.).

## XII.

The opinion of the Court is rested upon a ground that came up during the oral argument and was not argued in the written brief of the respondent. The respondent in his brief of forty-five pages pays but scant attention to the Merchant Marine Act of 1920, to-wit, two pages (Respondent's Brief, pp. 42-43). He had been defeated below on this point, recognized the uniform current of decision against him, and had little faith in the point, being himself of the opinion, voiced at the trial, that "a stevedore is not a seaman." (R. 150) As a matter of fact, the respondent argued not that the Jones Act covered the case of stevedores, but that since Congress abolished the fellow servant rule as to railroad employees and since the Jones Act abolishes the fellow servant rule as to "seamen" by importing the provisions of the Federal Employers' Liability Act, the public policy of the law has been so changed as to require this Court even in the absence of a statute, to wipe out the fellow servant doctrine in the case of maritime employees who are not "seamen," to-wit, stevedores, that being the only remaining narrow field for the operation of the rule.

A decision of such momentous consequences as the decision in this case, based as it is upon a theory largely developed by members of the court during the course of the oral argument, and overlooking a long line of uniformly contrary decisions of the lower Federal courts, as well as the expressed intent of Congress, ought of right be heard again in order that the precise ground of the decision may be fully recon-

sidered in all its aspects and in all its consequences, and in the light of rules of construction that have been settled for many decades. The opinion of the Court as now written has thrown new confusion into a field whose limits are now none too well defined, and has again opened the flood gates of litigation to determine the innumerable problems which now arise as the result of the interpretation laid down by the Court in this decision. For example, will longshoremens and their employers be invested with all the duties and obligations now incident to the relation of ship owner and seamen. Will other maritime workers besides longshoremens, such as boiler makers, repairmen, dry-dock workers, painters, plumbers, upholsterers and carpenters be included within the scope of the word "seamen" and have their rights determined under the Jones Act?

If error has been committed, the time to correct it is now, before the decision in this case becomes final. If the question is re-examined now, much expensive future litigation may be avoided. If not, uncertainty and chaos will prevail until by a long process of adjudication this Court has again defined the lines which are now all but obliterated. In the meantime, the burden of expensive litigation placed upon shipowners, maritime employers, and workmen, by virtue of the uncertainty of the law, will be almost disastrous.

For the foregoing reasons your petitioner prays this Honorable Court that a rehearing may be granted in the above entitled cause in order that the doctrine laid down in the opinion may be re-examined in the light of the expressed intent of Congress, the settled

rules of construction, and the necessary consequences in the decision.

Dated the eighteenth day of November, 1926.

THE INTERNATIONAL STEVEDORING Co.,  
a Corporation.

By STEPHEN V. CAREY,  
R. E. BIGHAM,  
ALFRED J. SCHWEPPE,  
*Its Attorneys and Counsellors.*

989 Dexter Horton Building,  
Seattle, Washington

# CERTIFICATE OF COUNSEL

I hereby certify that I have examined the foregoing petition for rehearing and that in my opinion the petition is well founded, and that the petition is presented in good faith and not for delay.

STEPHEN V. CAREY,  
*Counsel for Petitioner*

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1926

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**No. 236**

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**INTERNATIONAL STEVEDORING COMPANY,  
A CORPORATION, PETITIONER**  
*against*  
**R. HAVERTY, RESPONDENT.**

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**ON WRIT OF CERTIORARI TO THE SUPREME COURT  
OF WASHINGTON**

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**BRIEF IN SUPPORT OF PETITION**

---

**STEPHEN V. CAREY,  
R. E. BIGHAM,  
ALFRED J. SCHWEPPE,**  
*Attorneys and of Counsel for Petitioner.*  
**989 Dexter Horton Building, Seattle, Washington.**



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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1926

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**No. 236**

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INTERNATIONAL STEVEDORING COMPANY,  
A CORPORATION, PETITIONER,

*against*

R. HAVERTY, RESPONDENT.

---

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF  
THE STATE OF WASHINGTON

---

**BRIEF IN SUPPORT OF PETITION**

---

**ARGUMENT**

**I.**

THE OPINION OF THE COURT, IN CONSTRUING THE WORD "SEAMEN" TO INCLUDE STEVEDORES, OVERLOOKS THE CONTRARY CONSTRUCTION MADE BY CONGRESS ITSELF.

Seamen since the earliest times have been the subject of congressional legislation, and the La Follette Seamen's Act of 1915, (38 Stat. 1164-85) merely constituted another step in the legislation for the benefit of merchant seamen. Stevedores and other

maritime workers having fixed habitations on shore, were at that time regarded by all courts as subject to state compensation acts (see citations in dissenting opinion of Mr. Justice Holmes in *Southern Pacific v. Jensen*, 244 U. S. 205, 223). Then, on May 21, 1917 came the decision in *Southern Pacific Co. v. Jensen*, 244 U. S. 205, holding stevedores ineligible to protection under state compensation laws but subject to maritime jurisdiction exclusively. Faced for the first time, as the result of this epochal decision, with the necessity of giving statutory protection to stevedores and other maritime workers having fixed habitations on shore, Congress within a few months (October 6, 1917) passed the so-called Johnson Amendment (40 Stat. 395) to Sections 24 and 256 of the Judicial Code, adding to the saving clause therein the words "and to claimants the rights and remedies under the Workmen's Compensation Laws of any state". This law was designed to overcome the rule of the Jensen case and to give protection to stevedores and similarly situated landmen engaged in maritime work.

With this law on the books designed to protect stevedores and other harbor workers by giving them swift and sure compensation under the Workmen's Compensation Acts of several states, Congress then undertook to protect seamen, and passed the Merchant Marine Act of 1920 (41 Stat. 1007), Section 33 being an amendment of Section 20 of La Follette Seamen's Act of 1915 relating to merchant seamen. At this point this court decided *Knickerbocker Ice Company v. Stewart*, 253 U. S. 149, holding invalid the amend-

ment of October 6, 1917 to protect stevedores. As the result of that decision Congress, which had attempted to take care of the needs of stevedores and seamen, respectively, in separate acts, thus found stevedores and other harbor workers again unprotected. In order to protect them Congress once more adopted an amendment to Sections 24 and 256 of the Judicial Code in the Act of June 10, 1922 (42 Stat. 634) by saving to "claimants for compensation for injuries to or death of persons *other than the master or members of a crew* of a vessel, their rights and remedies under the Workmen's Compensation Act of any State." Seamen were already included under the Merchant Marine Act of 1920, and therefore Congress took care to exclude them from the operation of the act of the amendment of June 10, 1922, which was designed to protect stevedores and other maritime workers. That this was the intention of Congress is not only apparent from the history of the acts and from their face, but is also specifically borne out by the reports of the house and senate judiciary committees respectively, relating to the act of June 10, 1922, which was S. 745.

The report (67th Congress 1st Session, Vol. 1, Report No. 94, dated June 6, 1921, Serial No. Vol. 7918) accompanying S. 745 and discussing the wide basic distinctions between seamen, on the one hand, and stevedore and other harbor workers, on the other hand, read in part as follows:

"This bill is intended to meet the very serious situation which has arisen as the result of the decision of the Supreme Court that the Johnson

amendment, October 6, 1917, was unconstitutional. (*Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149).

"There is a clear distinction between the two classes, seamen and landsmen, who work in and about ships.

"The special treatment which seamen have always had under the acts of Congress was recently emphasized by the provision of the Merchant Marine Act of 1920 extending to seamen, *but not to other maritime workers*, the same rights of recovery in the case of work accidents now enjoyed by interstate railway employees.

"The employer in the case of seamen is always the owner or charterer of the ship, and he has the use of the peculiar remedies of admiralty against the ship to recover his wages, or his damages under the maritime law in case of injury.

"*Longshoremen and ship repair men are land workers subject neither to the peculiar conditions nor to the laws which regulate seamen. They form a part of the labor which is of each state exactly as other workmen in the port in which they are employed. They are not migratory but local; their wages, their conditions of living, are covered by local standards. They do not in all cases form a special class always employed in this work. The peculiar maritime law applying to seamen is not applicable to their condition and no attempt has been made to apply it to them. They do not share in the advantages of the United States Marine Hospital, nor are*



their employers under any obligations to care for them in case of accident.

"Their employers furthermore are not usually ship owners. It is usual in the large ports for a local stevedoring firm to contract with the ship owner to load or unload his vessel and employ longshoremen who under his control handle the cargo.

"Repairs are usually done under contract with a local contractor, so that the men who are actually employed in doing the work have no direct relation with the ship or ship owner."

The report of the house judiciary committee (House report 67th Congress, second session, Vol. 1. Report No. 639, dated January 31, 1922. p. 4, Serial No. Vol. 7955) accompanying S. 745, reads as follows:

"This bill is intended to carry out what the committee believes, after careful consideration, to be the correct solution for the problems of providing compensation for port workers. Previous to the decision of the Supreme Court of the United States no difference had arisen on this head, and the courts and administrative authorities acted on the assumption that state laws could grant compensation to these as well as to other workers within the state (citing many cases).

*"Congress has always in legislating distinguished between these port workers and seamen. It has assumed full control over the relations of master and servant at sea. Federal legislation determines the character of the quarters in which the crew is to be housed, the food*

to be served them, hours of labor, and reciprocal duties of seamen and officers. \* \* \* (recital of many other incidents of the peculiar seamen's relation). His right to recover damages was strictly limited by the law of the sea, but Congress in the Merchant Shipping Act of 1920 gave him a wide right to recover damages by putting him on the basis of employees of interstate commerce.

*"Congress has hitherto left to state control the relation of employer and servant in longshore work or in ship repairs."*

Both of these reports contain extended statements of the difference in situations between seamen and longshoremen, and point out that the intention of Congress, by reason of this difference of situations, was to legislate differently with respect to both. If the word "seamen" as used in the Merchant Marine Act of 1920 is open to construction at all, the reports of the committees of either branch of Congress may be examined with a view of determining the scope of the statutes passed on the strength of such reports.

*Binns v. U. S.*, 194 U. S. 486;

*McLean v. U. S.*, 226 U. S. 374;

*Lapina v. Williams*, 232 U. S. 78;

*Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149, 162;

*Hecht v. Malley*, 265 U. S. 144, 152;

*O'Hara v. Luckenbach SS. Co.*, U. S. Adv. Ops. 1925-6, p. 160.

Moreover, the debates in Congress while they may

not be resorted to for the purpose of interpretation, may be resorted to for the history of the acts in question.

*Standard Oil Co. v. U. S.*, 221 U. S. 1.

And the history of the acts as set forth in the Congressional Record (Cong. Rec. May 26, 1922, p. 7754) shows that Congress had in mind the unprotected situation of stevedores resulting from the constitutional decision of this court relating to stevedores and other maritime workers not seamen.

The amendment of June 10, 1922 was also passed, just as the previous one, in order to give stevedores statutory protection, of which they had been deprived by the Knickerbocker Ice Co. decision; but this amendment was held invalid in *Washington v. Dawson & Company*, 264 U. S. 219; and thus the statute which Congress had designed to protect stevedores and all other maritime workers "other than master or members of a crew of a vessel" (who were already protected by the Merchant Marine Act of 1920) went into the discard, this Court saying:

"Without doubt Congress has power to alter, amend, or revise the maritime law by statutes of general application embodying its will and judgment. This power, we think, would permit enactment of a general employer's liability law, or general provisions for compensating injured employees; but it may not be delegated to the several states."

Thus twice frustrated in its efforts to protect stevedores and other maritime workers of fixed habitation, but encouraged by this court in the Dawson

decision to pass "a general employer's liability law" protecting stevedores and similarly situated maritime workers, Congress again went at its task, and in May, 1926 and June, 1926, there were introduced in Congress H. R. 12063 and S. 3170 each entitled "Longshoremen's and Harbor Workers Compensation Act." The report of the House Judiciary Committee on H. R. 12063 (69th Congress first session, Report No. 1190) and of the Senate Judiciary Committee on S. 3179 (69th Congress, first session Report No. 973) contain a short and simple history of the legal status of longshoremen as established in the *Jensen*, *Knickerbocker*, and *Dawson* cases, and point out that stevedores are at the present time without any legislative protection whatsoever as the result of the decisions of this Court and "recommends that this humanitarian legislation be speedily enacted into law so that this class of workers, practically the only class without the benefit of workmen's compensation, may be afforded this protection which has come to be almost universally recognized in the interest of the social justice between employer and employee."

All of this subsequent Congressional legislation must be considered as an aid to the interpretation of prior legislation on the same subject.

*Tiger v. Western Investment Co.*, 221 U. S. 286;

*U. S. v. Pitman*, 147 U. S. 669;

*Alexander v. Alexandria*, 5 Cranch 1, 8.

The foregoing brief statement of the congressional legislation relating to seamen and stevedores, respectively, establishes the following:

(1) That Congress has legislated as to seamen for many decades and never legislated as to stevedores and other maritime workers until it became necessary to do so as the result of the decision of this Court in *Southern Pacific v. Jensen*. That decision did not require remedial legislation as to seamen, but did require it as to stevedores.

(2) That Congress has legislated for seamen and stevedores in separate statutes based upon a conception of the striking differences in their employments, to-wit, that stevedores and other maritime workers have a fixed location and residence on land, and ought therefore to be protected with legislation in the nature of workmen's compensation laws similarly to other land workers; whereas seamen, who are peripatetic in character, and who under the ancient rules of the admiralty law itself are entitled to compulsory compensation regardless of negligence to the extent of wages, care and cure, ought to have greater relief in the case of negligent injury.

(3) That Congress has always understood the word "seamen" in its ordinary well understood sense, *i. e.*, not to include stevedores.

## II.

THE OPINION OF THE COURT OVERLOOKS THE ACCEPTANCE BY CONGRESS OF THE DECISION OF THE CIRCUIT COURT OF APPEALS DEFINING THE WORD "SEAMEN" TO EXCLUDE STEVEDORES.

La Follette Seamen's Act of 1915 was interpreted by the Circuit Court of Appeals in *The Hoquiam*, 253 Fed. 627 (Oct. 28, 1918) not to include stevedores.

Congress in the Act of 1920 accepted the definition by amending the Act of 1915, again using exactly the same word "seamen" without changing the judicial interpretation theretofore placed upon the statute.

Hence, according to the ordinary rule of statutory construction, often applied by this Court, the amended Act of 1920 must be construed in the light of the judicial construction originally placed upon it which Congress is presumed to have known and accepted, namely: that the term "merchant seamen" does not include stevedores.

*B. & O. S. W. Ry. v. U. S.*, 220 U. S. 94 (Congress presumed to have adopted construction of lower federal courts);

*Logan v. U. S.*, 144 U. S. 263, 301 (Congress presumed to have adopted construction of lower federal courts);

*U. S. v. Falk*, 204 U. S. 143 (Congress presumed to have adopted construction of attorney general);

*Sewing Machine Company's Case*, 18 Wall. 553;

### III.

THE DECISION IN THIS CASE STRIKES THE WORD "ELECTION" FROM SECTION 33 OF THE MERCHANT MARINE ACT, AT LEAST AS TO STEVEDORES, AND THEREBY DEFEATS THE INTENT OF CONGRESS.

In *Panama R. R. Co. v. Johnson*, 264 U. S. 375, Section 33 of the Merchant Marine Act of 1920 was held valid solely because it gave a seaman the "election" between two systems of maritime law; that is,

either an election under the old rules consisting of wages to the end of the voyage, and maintenance and cure, or an election to proceed under the new rules imported into the admiralty law by the incorporation of the Federal Employers' Liability Act. That was the *sole basis* upon which the statute was sustained. The Court said in the *Panama* case (264 U. S. 375, pp. 388-9) :

"Rightly understood, the statute neither withdraws injuries to seamen from the reach and operation of the maritime law, nor enables the seamen to do so. On the contrary, it brings into that law new rules, drawn from another system, and *extends to injured seamen a right to invoke, at their election, either the relief accorded by the old rules, or that provided by the new rules.* The election is between alternatives accorded by the maritime law as modified, and not between that law and some non-maritime system."

And in *Engel v. Davenport*, U. S. Adv. Ops. 1925-6, p. 424, the action was founded by a *seaman* on the Merchant Marine Act of 1920, "in which the petitioner, instead of invoking as he might, the relief according to the old maritime rules, has elected to seek that provided by the new rules in an action at law based on negligence."

A stevedore has never had an "election" to proceed according to the "old rules" relating to a "seaman" and giving him "wages to the end of the voyage, and maintenance and cure for a reasonable time thereafter"; and, therefore, a stevedore has no "election" of substantive maritime theories of recovery under

Section 33 of the Merchant Marine Act. Thus under the construction given to Section 33 by the court in this case the word "election," at least in stevedoring and perhaps other cases, is entirely stricken out of the law. This result furnishes another illustration of the error of the court in this case because it is manifest that when Congress used the word "election" in Section 33, Congress intended to cover only persons who would have an "election" to proceed either under the old rules or the new rules of the maritime law, and not persons who had no "election" whatsoever, such as stevedores, boiler makers, dry dock workers, repair men, painters, plumbers and carpenters.

#### IV.

THE CONSTRUCTION PLACED UPON THE WORD "SEAMEN" BY THE OPINION OF THE COURT RESULTS IN ASCRIBING TO CONGRESS AN INTENT TO DISCRIMINATE WHICH IT CANNOT BE PRESUMED CONGRESS EVER HAD, AND WHICH IS CONTRARY TO ITS SETTLED PRACTICE.

The opinion rests upon the ground that the work of stevedores was in early times done by seamen and that the Court "cannot believe that Congress willingly would have allowed the protection to men engaged upon the same maritime duties to vary with the accident of their being employed by a stevedore rather than by the ship." It might be pointed out that the basic difference between a stevedore and a seaman is much greater than that recognized by the court in the foregoing language, and that basically



a stevedore and a seaman are engaged in entirely different employments, one having to do with the navigation of the ship and the other with its loading, and that the legal incidents, both rights and obligations, of these employments are entirely different. It has already been pointed out that Congress in legislating with reference to stevedores and seamen, respectively, has constantly borne in mind these basic differences. But passing by this observation, and assuming that the difference between a stevedore and a seamen is no greater than that pointed out in the opinion of the Court, and that therefore a stevedore can properly be included within the meaning of the word "seamen" by reason of the fact that anciently seamen did stevedores' work, what then of the dry dock workers, repairmen, boiler makers, upholsterers, plumbers, brass workers, painters, and carpenters who are also considered maritime workers when working on navigable waters, but are clearly not "seamen." Can it be assumed that Congress "willingly" included within the word "seamen" one class of workers who are not strictly seamen (such as stevedores) and "willingly" excluded other maritime workers who are not strictly "seamen" (such as repair men, boiler makers, dry dock workers, and the like)? The very fact that the construction adopted by the Court in this opinion would ascribe to Congress an intent to protect one class of maritime workers not strictly seamen, but to exclude another class of maritime workers not strictly seamen, shows that the construction is in itself a questionable one. The congressional legislation shows that with respect to maritime work-

ers other than seamen, Congress has always included all in the same legislation; and, therefore, to ascribe to Congress an intent to protect one class of maritime workers not strictly seamen but to exclude another class of maritime workers not strictly seamen is to ascribe to Congress an intention that Congress never had, and one that is contrary to its uniform practice with relation to the particular subject matter. If the court holds that Congress intended to include more in the word "seamen" than just merchant seamen in the ordinary and usual sense (which, as shown from the official reports of Congress itself, is the sense in which Congress has always understood it), then this Court must go the full distance and hold all maritime workers to be within the protection of the Seamen's Act even though they perform maritime duties which seamen never perform. If the Court should so hold, other remarkable consequences will follow which neither this Court nor any one else has ever anticipated.

## V.

THE OPINION OF THE COURT OVERLOOKS THE CONSEQUENCES OF THE DECISION ANNOUNCED, IN THAT IT BRINGS DEATH ACTIONS OF STEVEDORES UNDER THE MERCHANT MARINE ACT OF 1920, CONTRARY TO THE RECEIVED OPINION ON THAT SUBJECT.

The result of the decision in this case is that all death actions of stevedores, and possibly of repair men and other maritime workers who are not seamen, which have heretofore been brought under state death statutes supplementing the general maritime law under the rule of *Western Fuel Co. v. Garcia*, 257 U.

S. 233, have been erroneously brought. If the present opinion is correct, the supplement to the general maritime law in the form of state death statutes was superseded by the supervening uniform act of Congress in Section 33 of the Merchant Marine Act of 1920 (it has this effect as to seamen—*Engel v. Davenport*, U. S. Adv. Ops. 1925-6, p. 424). The result is that judgments in all such actions thus brought under state death statutes upon the assumption that there was no death act covering the case are erroneous, and that in many cases the statute of limitations prevents a new action being commenced under Section 33 of the Merchant Marine Act of 1920. The consequence is that the benevolent purpose of this Court in including stevedores within the meaning of the word "seamen" results in its becoming a "snare and a delusion."

Many death actions have been brought in the courts all over the United States for the death of stevedores and other maritime workers who are not seamen. They have been brought under state death statutes supplementing the maritime law under the doctrine of *Western Fuel Co. v. Garcia*, 253 U. S. 233. See, for example, the following:

*Roswall v. Grays Harbor Stevedoring Co.*, 132 Wash. 274; 138 Wash. 390;

*Dobrin v. Mallery S. S. Co.*, 298 Fed. 349;

*Obrien v. Luckenbach S. S. Co.* (C. C. A.), 293 Fed. 170;

*Young v. The Clyde S. S. Co.*, 294 Fed. 549;

*The Samnanger*, 298 Fed. 620;

*Groonstad v. Robins Dry Dock & Repair Co.*,  
236 N. Y. 52;

Benedict, Admiralty (5th Ed.), Section 148,  
p. 214.

If the opinion of the Court in this case stands, all of the foregoing actions have been brought upon the wrong theory and without jurisdiction, since, Congress having occupied the field, the state death statutes in the maritime law are *functus officio* and courts were without jurisdiction to maintain actions under them.

*Sherlock v. Alling*, 93 U. S. 99, 104;

*The Hamilton*, 207 U. S. 398;

*Cooley v. Port Wardens*, 12 How. 299, 318;

*Southern Pac. Co. v. Jensen*, 244 U. S. 205,  
216, 221.

In *Sherlock v. Alling*, 93 U. S. 99, upholding an action for a maritime death based on a state death statute, the court said:

"Whatever, therefore, Congress determines, either as to a regulation or the liability for its infringement, is *exclusive of state authority*. But with reference to a great variety of matters touching the rights and liabilities of persons engaged in commerce, either as owners or navigators of vessels, the laws of Congress are silent, and the laws of the state govern. \* \* \* Until Congress, therefore, makes some regulation touching the liability of parties for marine torts resulting in the death of the person injured, we are of the opinion that the statute of Indiana applies \* \* \*"

It is established by *Southern Pacific v. Jensen* that the admiralty law is drawn from three sources:

1. Acts of Congress:

"Congress has *paramount* power to fix and determine the maritime law that shall prevail throughout the whole country". (p. 216).

2. General Maritime law as accepted by the Federal Courts:

"In the absence of some controlling statute of Congress, the general maritime law as accepted by the federal courts constitutes part of our national law, applicable to matters within the admiralty and maritime jurisdiction." (p. 216).

3. State statutes supplementing to some extent "the general maritime law as accepted by the federal courts (which is source No. 2), in the absence of some applicable act of Congress:

"The general maritime law may be changed, modified or affected by state legislation. That this may be done to some extent cannot be denied \* \* \* Equally well established is the rule that state statutes may not contravene an applicable act of Congress." (p. 216)

If this court adheres to the view of the present opinion, then Congress has occupied the field to the exclusion of state laws, and the decisions the country over in maritime death cases founded on state statutes are wrong and without jurisdiction, and all the courts and the whole maritime bar have all these years been in error.

## VI.

THE OPINION IN THIS CASE, IF ADHERED TO, RESULTS IN AN OVERRULING OF SEVERAL RECENT DECISIONS OF THIS COURT IN MARITIME MATTERS.

The opinion in the present case overlooks other consequences. If the decision in this case is correct in bringing personal injury and death actions of stevedores, and perhaps of other maritime workers, under the Merchant Marine Act of 1920, then Congress, having exercised its power, and thus having eliminated state laws from the field, exclusively occupies the field. This result requires the overruling of the following cases:

*Miller Indemnity Underwriters Co. v. Braud*,  
U. S. Adv. Ops. 1925-6, p. 211;

*Grant Smith Porter Ship Co. v. Rohde*, 257 U.  
S. 469.

These cases are predicated on state statutes supplementing the admiralty law in the absence of a supervening uniform act of Congress.

*Sherlock v. Alling*, 93 U. S. 99, 104;

*Cooley v. Port Wardens*, 12 How. 299;

*Southern Pac. Co. v. Jensen*, 244 U. S. 205, 216,  
221.

If the decision in the present case is correct, then the many admiralty cases that have been decided in recent years on the theory of State statutes permissably supplementing the admiralty law in the absence of a supervening uniform act of Congress, *i. e.*, so long as Congress remains silent, have been erroneously decided because the fact has been com-

pletely overlooked that Congress has occupied the field to their exclusion.

## VII.

### THE OPINION OF THE COURT OVERLOOKS THE LANGUAGE AND EFFECT OF THE DECISION IN THE DAWSON CASE.

In *Washington v. Dawson*, 264 U. S. 219, the court said:

“Without doubt Congress has power to alter, amend, or revise the maritime law by statutes of general application embodying its will and judgment. This power, we think, would permit enactment of a general employer’s liability law, or general provisions for compensating injured employees; but it may not be delegated to the several states.”

The *Dawson* case was argued on January 8, 1924, and decided February 25, 1924, and the foregoing language was used after *Panama R. R. Co. v. Johnson*, 264 U. S. 375, holding valid Section 33 of the Merchant Marine Act of 1920, had already been argued before this court. *Panama R. R. Co. v. Johnson* was argued December 7, 1923, one month before the *Dawson* case, and decided April 7, 1924. Since the court at the time of deciding the *Dawson* case, relating to stevedores had under consideration the Merchant Marine Act of 1920 relating to “merchant seamen,” the statement in the *Dawson* case that the constitution gave Congress power which “would permit enactment of a general employer’s liability law” for stevedores shows that this

court at the time of the *Dawson* case did not entertain the view that stevedores were included in the Merchant Marine Act of 1920 relating to merchant seamen. This must necessarily be true because, if the provisions of the seamen's act applied to stevedores, there was *already* "a general employees' liability law" in the field, and the decision in the *Dawson* case should have turned on how far Congress could let state laws apply in a field already exclusively occupied by Congress with a "general employers liability law."

### VIII.

THE OPINION OF THE COURT OVERLOOKS THAT CONGRESS IN THE MERCHANT MARINE ACT OF 1920 EXPRESSLY MENTIONS BOTH "STEVEDORES" AND "SEAMEN" AND HENCE CANNOT BE PRESUMED TO HAVE USED THE WORD "SEAMEN" TO INCLUDE STEVEDORES.

The Merchant Marine Act of 1920 expressly mentions both stevedores and seamen. In Section 30 of the Act of 1920 the lien of "stevedores" is twice mentioned in express terms. Since Congress, therefore, in the same act expressly used both the term "stevedores" and the term "seamen," it is violating an elementary rule of construction to say that whenever Congress used the word "seamen" it intended to include therein "stevedores."



## IX.

THE OPINION OF THE COURT OVERLOOKS THE RULE OF CONSTRUCTION THAT WORDS AND PHRASES IN A STATUTE MUST BE CONSTRUED WITH REGARD TO THE STATUTE AS A WHOLE.

Probably no rule of statutory construction is better settled than that "a statute ought not to be expounded by detaching words and phrases but the whole act must be taken together and given a fair interpretation."

*Gayler v. Wilder*, 10 How. 477, 496;

*U. S. v. Boisdore*, 8 How. 113.

In construing a word, regard must be had to the statute as a whole and the general context. The construction given by the court to the word "seamen" in this opinion cannot in the nature of things be applicable to the word "seamen" wherever used elsewhere in the Merchant Marine Act of 1920 or in the La Follette Seamen's Act of 1915 which it amends, which relates to "seamen's" wages, hours of labor, food, flogging, and the like. Therefore, since the word "seamen" as used in the other sections of the Merchant Marine Act of 1920 cannot possibly be construed to include stevedores, the ordinary well understood meaning must be given to the word "seamen" in Section 33 because Congress is presumed to have intended to use words harmoniously throughout the entire act.

## X.

THE OPINION OF THE COURT OVERLOOKS THE RULE OF CONSTRUCTION THAT WORDS MUST BE GIVEN THEIR ORDINARY MEANING.

Congress is presumed to have intended to use language in its ordinary meaning unless it would manifestly defeat the object of its provision.

*Minor v. Mechanics Bank*, 1 Pet. 46.

A statute should be read according to the nature and obvious import of its language, without resorting to subtle and enforced construction for the purpose of either limiting or extending its operations; and when the language is plain, words and phrases should not be inserted so as to incorporate in the statute a new and distinct provision.

*U. S. v. Temple*, 105 U. S. 97;

*Maillard v. Lawrence*, 16 How. 251, 261;

*U. S. v. Salen*, 235 U. S. 237.

In the course of judicial decision of many decades the word "seamen" has acquired a well understood and well settled meaning, to-wit, persons who sign the articles, serve aboard ship, and assist in navigation.

*Gonzales v. U. S. E. F. Corp.*, 3 Fed. (2d) 168;

*Young v. Clyde S. S. Co.*, 294 Fed. 549;

*The Chicago*, 235 Fed. 538;

*The Buena Ventura*, 243 Fed. 798.

In *Gonzales v. U. S. E. F. Corp.*, 3 Fed. (2d) 168, the Court, said:

"The Standard Dictionary defines a 'seaman' as 'one not an officer who takes part in the practical navigation of the vessel—sailor.' It defines

a 'sailor' as 'one whose occupation is to aid in navigating vessels, especially one of the crew'."

In *Young v. Clyde S. S. Co.*, 294 Fed. 549, the Court said:

"Plaintiff's deceased husband was generally employed as a laborer and had not signed as a seaman on the articles or engaged in navigation."

In *O'Hara v. Luckenbach S. S. Co.*, U. S. Adv. Ops. 1925-6, p. 160, a case arising under the Seamen's Act of 1915, the Court said (p. 163):

"In this conclusion we are fortified by the consideration that the legislation deals with seamen and the merchant marine and, consequently, the phrase \* \* \* is to be given the meaning which it had acquired in the language and usages of the trade to which the act relates, in accordance with the rule stated in *Unwin v. Hanson* (1891), 2 Q. B. 115, 119: 'If the Act is one passed with reference to a particular trade, business, or transaction, and words are used which everybody conversant with that trade, business, or transaction knows and understands to have a particular meaning in it, then the words are to be construed as having that particular meaning, though it may differ from the common or ordinary meaning of the words'."

The opinion of the Court in this case, though recognizing that "as the word is commonly used, stevedores are not 'seamen'" stretches the meaning of the word seamen without regard to the context in which it is used and without regard to its ordinary and received meaning, and without regard to the real intent of Congress as often expressed.

## XI.

## THE OPINION OF THE COURT OVERLOOKS, WITHOUT DISCUSSION, UNIFORM CONTRARY DECISIONS OF THE FEDERAL COURTS.

The following cases are uniformly contrary to the opinion of the Court in this case:

*Cassil v. U. S. Emergency Fleet Corp.* (C. C. A.), 289 Fed. 774;

*The Hoquiam* (C. C. A.), 253 Fed. 627;

*Young v. Clyde S. S. Co.* (D. C.), 294 Fed. 549;

*Grimberg v. Admiral Oriental Line*, 300 Fed. 619;

*Johnson v. American-Hawaiian S. S. Co.*, 14 Fed. (2d) 534:

*The Steel Age* (1923), A. M. C. 348;

*Carstensen v. Hammond Lumber Co.*, 11 Fed. (2d) 142;

*Martis v. Union Transfer Co.*, 202 N. Y. Sup. 56 (App. Div.).

We recognize that the decisions of the lower courts are not binding upon this Court, but a uniform contrary opinion in cases where the question was fully argued and presented is always entitled to considerable weight. The foregoing cases on the precise question involved, as well as the death cases of stevedores and other maritime workers, and other cases where state statutes have been permitted to supplement the admiralty law in the absence of a supervening uniform act of Congress, indicate that it has been the uniform opinion of the courts all over the United States, as well as of the maritime bar, that steve-

dores cannot and were not intended to be included by Congress within the scope of Section 33 of the Merchant Marine Act of 1920. (See "Longshoremen and Accident Compensation," by Lindley M. Clark, 1926 A. M. C. 1488. See also Andrew Furseth, "Harbor Workers are not Seamen," 11 Am. Labor Leg. Rev. 139; T. V. O'Connor, "The Plight of Longshoremen," 11 Am. Labor Leg. Rev., p. 146.) The last two articles were cited by Mr. Justice Brandeis in his dissent in *Washington v. Dawson & Co.*, 264 U. S. 219, 237.

## XII.

THE OPINION OF THE COURT IS RESTED UPON A POINT THAT DEVELOPED DURING THE ORAL ARGUMENT AND WAS MERELY MENTIONED IN THE WRITTEN BRIEF OF THE RESPONDENT.

The respondent in his brief of forty-five pages pays but scant attention to the Merchant Marine Act of 1920, to-wit, two pages (Respondent's Brief, pp. 42-43). He had been defeated below on this point, recognized the uniform current of decision against him, and had little faith in the point, being himself of the opinion, voiced at the trial, that "a stevedore is not a seaman" (R. 150). As a matter of fact, the respondent did not argue that the Merchant Marine Act expressly covered the case of stevedores, but that since Congress abolished the fellow servant rule as to railroad employees and since the Jones Act abolishes the fellow servant rule as to "seamen" by importing the provisions of the Federal Employers' Liability Act, the public policy of the law has been so changed as to require this Court, even in the absence

of a statute, to wipe out the fellow servant doctrine as an original maritime rule in the case of maritime employees who are not "seamen," to-wit, stevedores—that being the only remaining narrow field for the operation of the rule.

A decision of such momentous consequence as the decision in this case, based as it is upon a theory largely developed by the members of the Court during the course of the oral argument, and overlooking the long line of uniformly contrary decisions of the lower Federal courts, as well as the expressed intent of Congress, ought of right be heard again in order that the precise ground of the decision may be fully reconsidered in all its aspects and in all its consequences and in the light of the clear intent of Congress and of the rules of construction that have been settled for centuries.

## CONCLUSION

Until the present decision the law relating to stevedores and other similar maritime workers was quite well defined. The opinion of the Court as now written has amazed the bar the country over, and thrown new confusion into the field, and has again opened the flood gates of litigation to determine the innumerable problems which now arise as the result of the interpretation laid down by the Court in this decision. For example, will longshoremen and their employers be invested with all the duties and obligations now incident with the relation of ship owner

and a seaman? That is, has a longshoreman also an "election" under the old rules of the maritime law so as to give him, a landsman, "wages to the end of the voyage," and maintenance, and cure? Will other maritime workers besides longshoremen, such as boiler makers, repair men, dry dock workers, watchman, painters, plumbers, upholsterers and carpenters be included within the scope of the word "seamen" and have their rights determined under the Merchant Marine Act? Have they too an "election" under the old rules of the maritime law giving them "wages to the end of the voyage" and maintenance, and cure?

For the foregoing reasons your petitioner prays this Honorable Court that a rehearing may be granted in the above entitled cause in order that the doctrine laid down in the opinion may be re-examined in the light of the expressed intent of Congress, the settled rules of construction, and the necessary consequences of the decision.

If error has been committed, the time to correct it is now, before the decision in this case becomes final. If the question is re-examined now, much expensive future litigation may be avoided. If not, uncertainty and chaos will prevail until by a long process of adjudication this court has again defined the lines which are now all but obliterated. In the meantime, the burden of expensive litigation placed upon shipowners, maritime employers, and workmen, by virtue of the uncertainty of the law, will be virtually disastrous.

"The preservation of sound legal principles is of

paramount importance. Time may cure financial hurt to the individual, but an erroneous declaration of the legal principle, or its misapplication, by a court of last resort, is a harm that time will not heal; it but intensifies the wrong. Under our judicial system a bad precedent, or a judgment ill-pronounced, does not die with its pronouncement, but lives to touch and tarnish the entire current of the law."

Respectfully submitted,

STEPHEN V. CAREY,

R. E. BIGHAM,

ALFRED J. SCHWEPPE,

*Attorneys and Counsel for Petitioner.*



## APPENDIX

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### Supreme Court of the United States

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No. 236.—OCTOBER TERM, 1926

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International Stevedoring Company, Petitioner, vs. R. Haverty.	} On Writ of Certiorari to the Supreme Court of the State of Washing- ton.
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[October 18, 1926.]

Mr. Justice HOLMES delivered the opinion of the Court.

This is an action brought in a State Court seeking a common law remedy for personal injuries sustained by the plaintiff, the respondent here, upon a vessel at dock in the harbor of Seattle. The plaintiff was a longshoreman engaged in stowing freight in the hold. Through the negligence of the hatch tender no warning was given that a load of freight was about to be lowered, and when the load came down the plaintiff was badly hurt. The plaintiff and the hatch tender both were employed by the defendant stevedore, the petitioner here, and the defendant

asked for a ruling that they were fellow servants and that therefore the plaintiff could not recover. The Court ruled that if the failure of the hatch tender to give a signal was the proximate cause of the injury the verdict must be for the plaintiff. A verdict was found for him and a judgment on the verdict was affirmed by the Supreme Court of the State. 134 Wash. 235, 245. A writ of certiorari was granted by this Court. 269 U. S. 549.

The petitioner argues that the case is governed by the admiralty law; that the admiralty law has taken up the common law doctrine as to fellow servants, and that by the common law the plaintiff would have no case. Whether this last proposition is true we do not decide. The plaintiff cites a number of decisions of which it is enough to mention *The Hoquiam*, 253 Fed. Rep. 627, and *Cassil v. United States Emergency Fleet Corporation*, 289 Fed. Rep. 774. It also refers to an intimation of this Court that whether the established doctrine be good or bad it is not open to courts to do away with it upon their personal notions of what is expedient. It is open to Congress, however, to change the rule and in our opinion it has done so. By the Act of June 5, 1920, c. 250 § 20; 41 Stat. 988, 1007, "any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply." It is not disputed that the statutes do way with the

fellow servant rule in the case of personal injuries to railway employees. *Second Employers' Liability Cases*, 223 U. S. 1, 49. The question therefore is how far the Act of 1920 should be taken to extend.

It is true that for most purposes, as the word is commonly used, stevedores are not "seamen." But words are flexible. The work upon which the plaintiff was engaged was a maritime service formerly rendered by the ship's crew. *Atlantic Transport Co. v. Imbrovek*, 234 U. S. 52, 62. We cannot believe that Congress willingly would have allowed the protection to men engaged upon the same maritime duties to vary with the accident of their being employed by a stevedore rather than by the ship. The policy of the statute is directed to the safety of the men and to treating compensation for injuries to them as properly part of the cost of the business. If they should be protected in the one case they should be in the other. In view of the broad field in which Congress has disapproved and changed the rule introduced into the common law within less than a century, we are of opinion that a wider scope should be given to the words of the act, and that in this statute "seamen" is to be taken to include stevedores engaged as the plaintiff was, whatever it might mean in laws of a different kind.

*Judgment affirmed.*

A true copy.

Test:

*Clerk, Supreme Court, U. S.*



**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1935

No. 236

**INTERNATIONAL STEVEDORING COMPANY,**  
a Corporation, Petitioner,

against

**B. HAVERTY, Respondent**

**BRIEF OF RESPONDENT**

**JOHN F. DORE**

**MARK W. LINDHMAN**

*Attorneys and Counsel for Respondent*  
305 American Bank Building  
Seattle, Washington

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# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

---

**No. 236**

---

INTERNATIONAL STEVEDORING COMPANY,  
A CORPORATION, PETITIONER,

*against*

R. HAVERTY, RESPONDENT.

---

## BRIEF OF RESPONDENT

---

*Statement of the Case. Facts and Law, briefly stated.*

The undisputed facts in this case are that the respondent Haverty, in the course of his employment by the petitioner, was injured when a load of wool weighing about 1800 pounds was negligently lowered into the hold of a vessel, striking him on the small of the back. At the time of the injury he was in the open hatchway, head bent down, engaged in "upending" a bale of wool previously lowered, preparatory to stowing it away in one of the wings of the ship.

The negligence of the petitioner consisted of the following acts:

1st, violating an agreement with the respondent which prohibited the lowering of a load whilst the men in the open hatchway were stowing away a previous load, and

2nd, failing to sound the customary warning of the descent of a load, which was agreed to be done under all circumstances.

It is conceded that the tort is maritime in nature, and liability should be judged by maritime standards. For the Court's consideration and ultimate application three principles of law are presented by the parties to this suit. They are as follows:

1st, the fellow servant doctrine, presented by the petitioner;

2nd, the non-delegable duty doctrine, an outgrowth and modification of the fellow servant doctrine, presented by the respondent; and

3rd, the Jones Act (Federal Employers Liability Act) which abrogated the fellow servant rule, also presented by the respondent.

Of the three principles presented to the Court only one is a maritime standard of employment conduct, the Jones Act; the other two are of common law or land origin. However, in their ultimate results, which will more clearly appear further on, the application of either principle contended for by the respondent—the non-delegable duty doctrine or the Jones Act—will be the same, i. e.

"A servant has the right to rely on signals and warnings customarily given in the conduct of the business in which he is engaged, and if the master fails to give these, he is negligent."

*St. Louis v. Jeffries*, 276 Fed. 73 (1921), where cases under both principles of law presented by respondent have been collected by the Court (See page 75).

## OUTLINE OF LEGAL PROPOSITIONS

### "A"

The Supreme Court of the United States will uphold a State Court providing its decision in a maritime case will work no material prejudice to the uniformity of the maritime law.

*Southern Pacific v. Jensen*, 244 U. S. 205.

*Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149.

### "B"

Master and Servant relations on land.

Evolution of fellow servant doctrine.

(1) The law of fellow service is a common law doctrine.

*Murray v. South Carolina R. Co.*, 1 McMullan's 385, 36 Am. Dec. 268 (1841).

*Farwell v. Boston, etc., Co.*, 4 Metcalf 49, 38 Am. Dec. 339 (1842).

18 R. C. L. p. 715.

"*Genius of the Common Law*," Sir Frederick Pollock, p. 102.

(2) The fellow servant doctrine was modified by the common law courts because of its harsh effects in employment relations, giving rise to non-delegable duty and other doctrines.

18 R. C. L. pp. 716, 717, 730, 731.

*Hough v. Texas*, 100 U. S. 213.

(3) The duty of giving warnings and signals to servants where such acts are necessary to the safety of the men is a non-delegable duty.

*Union Pac. v. Fort*, 17 Wall, 553,

*Wabash v. McDaniels*, 17 Otto 454,

*Mather v. Rillston*, 156 U. S. 391,

*Sante Fe v. Holmes*, 201 U. S. 438,

*Kreigh v. Westinghouse*, 214 U. S. 255,

*Standard Oil v. Brown*, 218 U. S. 78,

18 R. C. L., 734,

*Cook v. Camp*, 183 N. C. 48,

26 Cyc. 1168,

*Labatt, Master & Servant*, 2nd Ed. p. 2936, p. 4308,

*Anderson v. Mill Co.*, 42 Minn. 424,

*Mooney v. Belleville Stone Co.*, 61 N. J. L. 253,

*Burlington v. Crocket*, 19 Neb. 138,

*Ondix v. Tea Co.*, 82 N. J. L. 511,

*Erickson v. St. Paul*, 41 Minn. 500,

*Maness v. Coal Corp.* 128 Tenn. 143,

*Bowman v. Coal Co.*, 168 Mo. App. 703,

*Hough v. Grants Pass*, 41 Ore. 531,

*Chicago v. Gross*, 35 Ill. App. 178,

*Postal Tel. v. Hulsey*, 132 Ala. 444,  
*Wendell v. Penn.*, 57 N. J. L. 467,  
*Lyons v. Ryerson*, 148 Ill. App. 284,  
*Jones v. R. Co.*, 149 Ky. 566,  
*Hines v. Mfg. Co.*, 199 Mass. 522,  
*Fitzgerald v. Twine Co.*, 104 Minn. 138,  
*Lancaster v. R. Co.*, 143 Mo. App. 163,  
*Germanus v. R. Co.*, 74 N. J. L. 662,  
*Baccelli v. Delaware*, 122 N. Y. S. 849,  
*Toledo R. Co. v. Bartley*, 172 Fed. 82,  
*Chicago R. Co. v. Dutcher*, 182 Fed. 494,  
*Allard v. Contract Co.*, 64 Wash. 14,  
*McLellan v. Fuller*, 226 Mass. 374,  
*Moore v. R. Co.*, 185 N. C. 189,  
*Waiswillla v. R. Co.*, 220 Ill. App. 113,  
*Coast Ship Co. v. Yeager*, 120 Miss. 152,  
*Brown v. Sessler*, 128 Tenn. 665,  
*Arveson v. Boston, etc., Wharf*, 128 Minn. 178,  
*United v. Kuchan*, 253 Fed. 425,  
*Preston v. R. Co.*, 292 Mo. 442,  
*Richmond v. Bailey*, 92 Va. 554,  
*Schoen v. R. Co.*, 112 Minn. 38,  
*McKee v. R. Co.*, 151 Ky. 698,  
*McCalley v. R. Co.*, 169 Ky. 47,  
*Huxoll v. R. Co.*, 99 Neb. 170,  
*Curran v. R. Co.*, 211 N. Y. 60,  
*Illinois v. Zimekowski*, 220 Ill. 324,  
*Peters v. George*, 154 Fed. 634,

*Western Electric v. Hanselman*, 136 Fed. 564,  
*Maloney v. Stetson*, 46 Wash. 645,  
*Cole v. Gerrick*, 62 Wash. 226,  
*Comrade v. Atlas*, 44 Wash. 470,  
*Cunningham v. Adna*, 71 Wash. 111,  
*O'Brien v. Page*, 39 Wash. 537.

(4) The States abrogated the fellow servant doctrine by the progressive enactment of Fellow Servant, Employer's Liability and finally Workmen Compensation Acts.

18 R. C. L. 821-824,

28 R. C. L. p. 712 et seq.

*Labatt, Master & Servant*, Vol. 8, p. 8864 et seq.

(5) Congress abrogated the fellow servant doctrine by enacting the Federal Employer's Liability Act.

18 R. C. L. 825,

2nd Employer's Liability Cases, 223 U. S. 1.

(6) Under both the common law and Federal Employer's Liability Act the duty of giving signals and warnings is a non-delegable duty, and if the master fails to give these he is negligent. The law is uniform in both State and Federal Courts.

See cases under heading, "3", supra.

*St. Louis v. Jeffries*, 276 Fed. 73; where cases have been collected on p. 75.

*Collins v. Barner*, 268 Fed. 699,

*Federal Mining Co. v. Anderson*, 247 Fed. 472,  
*Brown v. Pacific Coal*, 241 U. S. 571,  
*Labatt, Master & Servant*, p. 4308, 2nd Ed.,  
*McGovern v. Philadelphia*, 235 U. S. 389,  
*Lehigh Valley v. Doktor*, 290 Fed. 760,  
*B. & O. v. Robertson*, 300 Fed. 314.  
*Hogan v. Killeen*, 265 Fed. 614,  
*Director General of Railroads v. Templin*, 268 Fed.  
 483,  
*Reed v. Director General*, 258 U. S. 92,  
*Glacken v. Cincinnati*, 209 Ky. 28.

### "C"

Master and Servant Relations on water.

The Doctrine of fellow service in Admiralty.

(1) The "Maintenance, wage and cure" doctrine permits a seaman to recover for injuries without regard to the negligence of a coworker (a medieval doctrine).

*Harden v. Gordon*, 2 Mason 541; 11 Fed. Cases 480,  
*The Osceola*, 189 U. S. 158,  
*Washington v. Dawson*, 264 U. S. 232,

(2) The Admiralty Courts adopted the Merchants' Shipping Act of 1876 (English) permitting a seaman to recover damages for unseaworthiness of the vessel without regard to the negligence of a coworker.

*The Osceola*, *supra*,  
*Washington v. Dawson*, *supra*.

(3) The Federal Courts, Supreme and inferior, adopted the progressive features of the common law doctrine of fellow service in longshoremen cases.



*Atlantic Transport Co., v. Imbroke*, 234 U. S. 52,  
*Standard Oil v. Anderson*, 212 U. S. 215,  
*The Buffalo*, 154 Fed. 815,  
*The Buffalo*, 147 Fed. 304,  
*Benedict on Admiralty*, 5th Ed. p. 33,  
*Panama v. Minnix*, 282 Fed. 47,  
*Magdaline*, 91 Fed. 798,  
*The Howell*, 273 Fed. 513,  
*Kinghorn*, 297 Fed. 621,  
*Alaska Pac. v. Egan*, 202 Fed. 867,  
*Flynn v. Christensen*, 273 Fed. 385,  
*Pioneer*, 78 Fed. 600,  
*Galley v. Smith*, 272 Fed. 999,  
*City of Antonio*, 143 Fed. 955,  
*Victoria*, 69 Fed. 160,  
*Boveric*, 167 Fed. 520,  
*Gladestry*, 128 Fed. 591,  
*Lisnacrieve*, 87 Fed. 570,  
*Pac. Am. Fisheries v. Hoof*, 291 Fed. 306,  
*Siebert v. Patapsco*, 253 Fed. 685,  
*Anderson v. Pittsburg Coal Co.*, 108 Minn. 455,  
*Westlund v. Rothchild*, 53 Wash. 626,  
*Anderson v. Globe*, 57 Wash. 502,  
*Jacobsen v. Rothchild*, 62 Wash. 127,  
*Norman v. Shipowners*, 59 Wash. 244.

(4) The Admiralty Courts adopted as part of the admiralty law State Statutes which worked no material prejudice to the uniformity of the maritime law.

*The Hamilton*, 207 U. S. 398,  
*Western Fuel v. Garcia*, 257 U. S. 233,  
*Great Lakes v. Kierejewski*, 261 U. S. 479,  
*Red Cross Line v. Atlantic Fruit*, 264 U. S. 109,  
*Millers', etc. v. Brand*, Advance opinion decided Feb.  
 1, 1926.

(5) Congress established a new public policy in maritime employment relations by introducing the vice principle doctrine in 1915, passing

Sec. 20, Act of March 4, 1915, 38 Stat. at L. Chap.  
 153, p. 1185.

(6) Congress abrogated the fellow servant doctrine in 1920 by enacting the Jones Act, and brought into admiralty a large body of land doctrines.

Sec. 33 of the Act of June 5, 1920, Chap. 250, 41  
 Stat. at L. 1007,

*Panama v. Johnson*, 264 U. S. 375.

(7) Under both the common law and Federal Employers Liability Act (Jones Act) the duty of warning and signaling is non-delegable.

*St. Louis v. Jeffries*, *supra*,

See cases under (B 3) (B 6) and (C 3).,

*Atlantic v. Imbrovek*, *supra*,

*Panama v. Johnson*, *supra*.

(8) The application of the monitory signal doctrine will work no material prejudice to the uniformity of the maritime law, and it will give effect to an employment agreement entered into by the parties—to furnish the servant a safe place to work.

*Anderson v. Pittsburg Coal Co.*, supra,  
*St. Louis v. Jeffries*, supra,  
*Millers' v. Brand*, supra,  
*Atlantic Transport v. Imbrovek*, supra.

#### STATEMENT OF FACTS—*The Injury*

“In order to clearly understand the (legal) questions thus raised,” said Chief Justice Tolman, the writer of the opinion in the State Court, p. 237, 134 Wash. Rep., “the facts must be stated with some detail.” More frequently in the discussion of principles of law the facts concerning the injury and the obligation of the master are lost sight of. As Judge Stacy has pertinently stated it in a similar case involving the monitory signal doctrine in a well reasoned opinion, “the mental confusion which has led to discordant adjudications on the subject . . . is produced by momentarily losing sight of the plaintiff’s safety and the duty which the defendant owed to him, while thinking of the relation existing between the plaintiff and the other employees.” *Cook v. Camp Mfg. Co.*, 183 N. C. 48; (1921).

Continuing the facts Judge Tolman said, bottom of page 237:

“The respondent and his fellow laborers were employed at the bottom of the ship, some forty or fifty feet below the deck upon which the winches stood and where the winch driver and the hatch tender had their stations. It was the duty of the hatch tender to see to the gear, have everything in order, and direct the operations.

"The loading operations in progress when the accident occurred were carried on in this wise: A sling, attached to a boom, was deposited upon the dock, in which was placed a load of four bales of wool, each bale weighing from four hundred to five hundred pounds, and the total load weighing from sixteen hundred to two thousand pounds. The hatch tender standing near the rail of the vessel, supervised the fastening of the sling, and when it was loaded and in order, it was his duty to give a signal to the winch driver to raise the sling and carry its load over and above the hatch, ready for lowering. It was then the duty of the hatch tender to step to the hatch, look over the coaming into the hold, observe if the previous load had been disposed of, and then give a warning to the men engaged below by calling out, "Look out below," or words to that effect; and thereupon, and not until then, to give the winch driver directions to lower the load into the hold. The men thus warned stood back from the open hatchway until the load came within their reach, when they swung or pushed it into position to be released and deposited. The sling was then carried up by the operation of the winch and the process repeated.

"With reference to the particular load which caused the injury, the evidence, so far as it goes, is undisputed; but that evidence fails to show whether the load was lowered by the order of the hatch tender or whether it was lowered by the winch driver without any such order. But lowered it was, without any warning to those engaged below, and at the time the respondent was in a stooping position, bending over the previous load in the discharge of his duties, and the descending load struck him upon the back, causing his injuries, the extent and nature of which need

not now be described.”

If from the cold printing of these facts the Court can visualize the helpless condition of the respondent—lulled into a sense of security by the promises of the master to look out for his safety—and see the urgent necessity for carrying out the two safety agreements set forth in the fore part of the brief, this Court will agree with Judge Tolman when he said, p. 244, “we think if the facts of this case are carefully considered, and it is recognized that respondent was working in a place and under conditions where he could do nothing for his own protection and must rely absolutely upon the performance by the master of the duty to warn him of descending loads, the non-delegability of that duty becomes apparent, and the hatch tender under the circumstances shown became a vice principal.”

“A”

The Supreme Court of the United States will uphold a State Court providing its decision in a maritime case will work no material prejudice to the uniformity of the maritime law.

The facts being undisputed the question now is, did the Supreme Court of the State of Washington apply a principle of law which contravenes an essential feature of the maritime law? *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149.

If the injury had occurred on land—if respondent had been a land longshoreman—there is no doubt that the respondent would have been entitled to recover under the Washington Workmen’s Compensation Act. *St. ex rel*

*Davis-Smith v. Clausen*, 65 Wash. 156.

Moreover, if he had been a sailor doing the same kind of work, under exactly the same conditions (in a number of vessels the sailors still do the loading and unloading) the respondent would be entitled to recover under the Jones Act. *St. Louis v. Jeffries*, supra.

But because he was employed by a stevedoring company—instead of a shipowner—to perform work, the stowage of cargo, which is as necessary to the safety of the vessel as the steering (*Imbrovek* case, supra) petitioner contended in the State Courts, and does here also, that the respondent cannot recover because of the doctrine of fellow service, which it labels a maritime principle. That doctrine we contend is a common law or land principle. To the petitioner the character of the employer (and not the locality of the injury or the character of the employment) determines primarily the principle of law to apply. Evaluating petitioner's contention properly the respondent is placed in the anomalous position of having his maritime tort judged not by maritime standards but by the common law standard of 1841, as will hereinafter appear.

On the other hand respondent requested, and does here also, the application of one of two principles of law, either the non-delegable duty doctrine or the Jones Act. As stated before the application of either one is the same, "a servant is entitled to warnings and signals in an unsafe place where such signals have been customarily given."

The State Supreme Court rejected the fellow servant doctrine. Instead, it applied the non-delegable duty doctrine, although it thought the Jones Act the better of the two principles proposed by respondent. However, in applying the former the Court did not destroy the uniformity of the maritime law. *Imbrovek* case.

Moreover, by adopting the principle of law that the respondent was entitled to a warning the Court gave full force and effect to the agreement of employment conditions entered into by the parties to the suit.

*Millers' Indemnity Underwriters v. Brand*, Adv. Op. Decided Feb. 1, 1926.

### "B"

#### Outline of Argument—*Fellow Servant Doctrine*.

Petitioner contending that the fellow servant doctrine is an essential feature of the maritime law our starting point will be with that doctrine. Moreover, by commencing with the fellow servant doctrine we will be able to pass successively into the principles contended for by the respondent.

A kaleidoscopic view, for the present, of the fortunes of the fellow servant doctrine on land and water will show that that doctrine was first announced as a rule of conduct in 1841 on land, in a railroad case; went through a process of modification by the courts and was finally rejected by the legislatures, state and national. Its application today as modified by the many exceptions, is confined to comparatively few cases. A more humane and certain

method of compensation for industrial injuries is being applied today in by far the great majority of the cases through State Compensation Acts. Public policy, judicial and legislative, has decreed against the fellow servant doctrine.

The basic causes for the birth, growth, modification and rejection of the fellow servant doctrine are traceable to the great changes in employment relations which have been brought about by the introduction and extended use of machinery in our economic life the past century and more. As machinery came more and more into general use, requiring more employees to perform the general operation of manufacturing, mining, and transportation, new problems in torts arose, and the courts sensing the great changes were compelled to modify the original meaning of the fellow servant doctrine. Finally many of the state legislatures, and Congress, tired of the manner in which courts determined liability, "by the sporting rules of the common law" abolished the doctrine in its entirety. 28 R. C. L. 750.

In the second section of this brief an attempt will be made to trace the fortunes of the fellow servant doctrine in admiralty. For the present it is sufficient to state that on water the same basic economic causes can be seen at work in the evolution of ships and shipping relations as on land. The use of machinery motivated by steam brought into the vessel new employees, such as coal passers, firemen, engineers and finally stevedores. *Imbrovek* case. The fellow servant doctrine crept into the admiralty courts (*The Howell*, 273 Fed. 573) ("The exten-



sion to the admiralty of the Fellow Servant Doctrine," Cunningham, 18 Har. Law Review, p. 295) when attempts were made on the part of injured maritime employees to override the medieval maritime rules of conduct, and obtain the benefits of the common law principles then prevailing. In the early admiralty cases no distinction was made by the courts as to the maritime nature of the principle to be applied. But when the line was drawn fast in the admiralty courts, in 1914, in the *Imbrovek* case, some of the more enlightened judges refused to follow the common law doctrine of fellow service of 1841. Instead they applied the ordinary theories of negligence, the Howell, *supra*, or the fellow servant doctrine as modified, *The Kinghorn*, 297 Fed. 621.

While the admiralty courts were legislating the many exceptions into the fellow servant doctrine, as on land, Congress took a hand, and in 1915 and 1920 rejected the doctrine, passing the Jones Act (in 1920) which established a new rule of conduct for maritime employees. That act placed employees on vessels upon the same plane with interstate commerce employees. *Panama v. Johnson*, 264 U. S. 375.

From the above it is obvious that time, with its accompanying changes in conditions, relations and public policies, has not been gentle with the fellow servant doctrine.

(B 1) The Law of Fellow Service is a Common Law Doctrine.

Prior to the introduction of machinery the cobbler, weaver, draper and other artisans attended to all the

details of producing an article. He was a handicraftsman. He produced the entire article himself, for example, he made a pair of shoes. But with the invention and use of machinery (fixed by historians, 1765) detailed production was introduced, each employee performing a single, a specialized detail of the general operation, be that manufacturing an article or operating a train. As Judge Evans said in 1841 in *Murray v. South Carolina R. Co.*, 1 McMullan's 385, 36 Am. Dec. 268:

“The regular movement of the train of cars to its destination is the result of the ordinary performance by each of several duties. If the fireman neglects his part the engine stops for want of steam; if the engineer his, everything runs to riot and disaster.”

Hence, when new employment conditions and relations—railroad operations—presented themselves to the courts in the *Murray* case and *Farwell v. Boston, etc.*, 4 Metcalf 49, 38 Am. Dec. 339 (1842), they found the old rule of “*respondeat superior*”—based on handicraft production—unadaptable to the new situations. These courts therein announced that employees working for a common master, and performing details of a general operation were fellow servants, and for any negligence of a fellow servant committed in the performance of a detail the employer was not liable. 18 R. C. L. 715. In passing, it is worth noting and repeating that although the use of machinery divided the labor into details, and required the services of several to perform those details to complete the general operation the term “common employment” was tagged onto the fellow servant doctrine rather than the later concept of “operative details.”

Of some significance here now is the social reason advanced by Chief Justice Shaw (Farwell Case) for projecting the new principle, which was progressive for its time. "In considering the rights and obligations arising out of particular relations it is competent for courts of justice to regard considerations of policy and general convenience, and to draw from such rules, as will, in their practical application best promote the safety and security for all parties concerned."

For a delightful account of the origin of the fellow servant doctrine see p. 102 "Genius of the Common Law" by Sir Frederick Pollock (1912).

(B 2) The fellow servant doctrine was modified by the common law courts because of its harsh effects in employment relations giving rise to non-delegable duty and other doctrines.

But, "Hardly had the doctrine of fellow service come into general recognition than it became apparent that rapidly changing economic conditions rendered it impolitic at least in unmodified form." 18 R. C. L. p. 716. Its harsh effects were quickly noticeable in those cases where the injured servant was employed by corporations, which, continues R. C. L. pp. 716, 717, "if they were to be exonerated from liability for injuries to their employees on the score of fellow service it followed that they could be liable in no case, inasmuch as they must need act and perform their functions through individuals who have a common employer. Changed ideals dictated a modification of the doctrine." (Note: According to the Bureau of the Census corporations employed in 1919 86 per cent

of the working population. World Almanac, 1924, p. 339.) In view of the increased number of corporations the reason for the change is stronger today. "The first of the qualifications of the doctrine to be generally recognized was the rule relating to the competency of co-employees. This seems to have satisfied requirements for a considerable time, but still further changes in economic conditions and public policy have dictated the principles of non-delegable duties, superior and inferior employees, and, more recently, different departments."

The rapidly changing economic conditions which prompted the courts to graft onto the fellow servant doctrine the various exceptions are traceable to the increased use of machinery. As the use of machinery was extended more servants were employed, and of significance here the number of details necessary to perform the general operation, namely, making shoes, were greatly increased.

"When the law of fellow servant was first announced, business enterprises were comparatively small and simple. The servants of one master were not numerous. They were all engaged in the pursuit of simple and common undertakings. Now things have changed, large enterprises are conducted by persons or by corporations employing vast number of servants divided into classes, each pursuing a different portion of the work and each practically independent of the other." 18 R. C. L. 758.

J. A. Hobson in his most excellent work, "Evolution of Modern Capitalism" (cited with approval in *Maple Flooring Mfrs' Ass'n v. U. S.*, 268 U. S. 563) has characterized the great change in the following language, p. 88:

“The typical unit of production is no longer a single family, or a small group of persons with a few simple cheap tools, but a compact and closely organized mass of labor composed of hundreds of individuals cooperating with large quantities of expensive and intricate machinery, through which passes a continuous and mighty volume of raw material on its journey to the hands of the consuming public.”

It was precisely because of the increasing number of detailed operations necessary to complete the general process of production and service that brought into legal existence the various modifying rules of the fellow servant doctrine of 1841. To take care of the multifarious details, superintendents, managers and others were employed, giving rise to the superior and inferior servant or vice principle doctrine. Many details of the general operation necessitated a further division of labor supervision into departments, and the departmental doctrine was announced. To safeguard the person and the life of the servants engaged in performing the various details employers were compelled by the courts to install safety guards, promulgate rules for operation, inspection of moving appliances and tools, and to give instruction and provide for warnings of moving operations and moving appliances. All of which gave rise to non-delegable duty and other rules modifying the original doctrine of fellow service.

“Another exception to the fellow servant doctrine as it was originally announced embraces what have been termed ‘absolute’ or ‘non-delegable’ duties of the employer. This exception, which seems to have been invented to meet the economic change caused by

the substitution of corporations for natural persons in commercial enterprises, declares that there are certain duties which the employer is absolutely bound to perform. While the corporation may confide their performance to an inferior officer or agent, it may not escape liability thereby. If the person to whom performance is confided neglect the obligation, his negligence is still that of the corporation. It is no answer to say that the corporation selected a competent person and that such person is in other respects a fellow servant of the injured employee. In respect of these duties he cannot be a fellow servant; he is a vice principal or agent of the employer." 18 R. C. L. pp. 730 and 731.

This steady march of legal progress by the courts in modifying the fellow servant doctrine was not universally followed. A few of the courts attempted to stem the tide. In 1893, Judge Hackney predicted the destruction of our industrial system, if the fellow servant doctrine be tampered with, saying:

"The fellow servant doctrine is founded in wisdom and any departure from it is dangerous to the prosperity and perpetuity of the enterprises of manufacturing, mining, railroading, and those industries requiring the services of many servants."

*New Pittsburg, etc., Co. v. Peterson*, 136 Ind. 398.

It is pertinent at this point to say that notwithstanding the doctrine has been abrogated by the States and Congress through the enactment of Workmen's Compensation Acts and Federal Employers Liability Acts for land and sea employees the country since the '90's has witnessed a tremendous growth in industry. See "Readings In Indus-

trial Society" by Leon Carrol Marshall, p. 655; and "Economic History of the United States" by E. L. Bogart, pp. 408, 425, 453.

Some of the courts were more astute than Judge Hackney. Resurrecting the old reason for the legal invention of the fellow servant doctrine, to-wit, "operative details," and tagging that term on they managed to keep alive the doctrine with some semblance of its old-time vigor by denying compensation to many injured employees. Those cases can be found on pages 26 to 34 in petitioner's brief. They are traceable to the Murray and Farwell, *supra*, cases of the '40's. The new idea, that warnings and signals were necessary to the safety of the men, coming into existence as a result of changed economic conditions and agreements since 1841, was not able to dislodge with cataclysmic effect the old idea and symbol which had its roots in the two early cases.

The suggestion that an employer is not liable to a servant for negligence of a coservant carrying out the details of the work, fortunately for the progress of the law, was not followed by the majority of the courts. Some of them saw that if that principle be carried out logically to the end no servant can ever recover because in machine production the general operation of manufacturing shoes, for example, consists of detailed operations or "operative details." No shoemaker today manufactures shoes by himself. Labatt, a writer of some prominence in the field of law, said that the only reason—if it can be called

such—the concept “operative details” has to support it is “by authority.”

“Viewed from the standpoint of the extent of a master’s obligations to his servants the doctrine that there can be no recovery for the negligence of a coservant in respect to the details of the work has been regarded as one deduced *ex necessitate rei*. It seems difficult, however, to concede that such a consideration has any real weight, except in so far as it may be a step towards the conclusion that the servant assumes the consequent risks. Taken by itself it may be said to be equally potent as a reason for insisting that the master should be chargeable with the negligence which, under the arrangements which he has chosen to make for carrying on his business, he knows to be occasionally inevitable. *Qui sentit commodum idem sentire debet et onus*. In whatever cloak of verbiage it may be wrapt up, a doctrine having no more solid foundation than the hypothesis that one of these inferences rather than the other should be drawn from the existence of the conditions adverted to is merely one formulated *ex cathedra*.

“A much more satisfactory reason for absolving the master from liability for negligence of this description is, that the servant is chargeable with an assumption of such risks because he knows them to be incident to the performance of the duties voluntarily undertaken by him. This is equivalent to saying that in cases in which the servant’s right to recover is denied on account of the nature of the injurious act, this conclusion is, in the last analysis, referable to precisely the same elementary conception as that which underlies the doctrine of common



employment itself." *Labatt, Master & Servant*, Vol. 4, 2nd Edition, pp. 4554, 4555.

(B 3) Non-delegable Duty Doctrine—*Signals and Warnings*.

The more enlightened common law courts early adopted the salutary rule that "a servant has the right to rely on signals and warnings customarily given in the conduct of the business in which he is engaged, and if the master fails to give these, he is negligent.

26 Cyc. p. 1168:

"When there is a special agreement by the master to warn the servant, the nonperformance of which is the occasion of injury to the latter, the master will be held liable."

26 Cyc. p. 1168.

"Where the employer has adopted a system (as in this case) for the purpose of notifying servants of the approach of a certain kind of transitory or sporadic danger, it is plain that the fact of the servant's having relied on the receipt of the customary warning, and *being induced not to keep as careful a watch* (as in this case) *as he would have otherwise kept* constitutes a specific and additional reason for holding the master liable for injuries which may result from the omission to give the warning on some particular occasion."

*Labatt's Master & Servant*, 2nd Ed. p. 2936; also p. 4308.

The following list, by no means exhaustive, are all signal or warning cases. In a later part of this brief we

shall give a list of longshoremen cases.

18 R. C. L., 734,

- Union Pacific v. Fort*, 17 Wall 553,  
*Mather v. Rillston*, 156 U. S. 391,  
*Sante Fe v. Holmes*, 201 U. S. 438,  
*Kreigh v. Westinghouse*, 214 U. S. 255,  
*Standard Oil v. Brown*, 218 U. S. 78,  
*Cook v. Camp*, 183 N. C. 48,  
*Anderson v. Mill Co.*, 42 Minn. 424,  
*Mooney v. Belleville Stone Co.*, 61 N. J. L. 253,  
*Burlington v. Crocket*, 19 Neb. 138,  
*Ondix v. Tea Co.*, 82 N. J. L. 511,  
*Erickson v. St. Paul*, 41 Minn. 500,  
*Maness v. Coal Corp.*, 128 Tenn. 143,  
*Bowman v. Coal Co.*, 168 Mo. App. 703,  
*Hough v. Grants Pass*, 41 Ore. 531,  
*Chicago v. Gross*, 35 Ill. App. 179,  
*Postal Tel. v. Hulsey*, 132 Ala. 444,  
*Wendell v. Penn.*, 57 N. J. L. 467,  
*Lyons v. Ryerson*, 148 Ill. App. 284,  
*Jones v. R. Co.*, 149 Ky. 566,  
*Hines v. Mfg. Co.*, 199 Mass. 522,  
*Fitzgerald v. Twine Co.*, 104 Minn. 138,  
*Lancaster v. R. Co.*, 143 Mo. App. 163,  
*Germanus v. R. Co.*, 74 N. J. L. 662,  
*Baccelli v. Delaware*, 122 N. Y. S. 849,  
*Toledo R. Co. v. Bartley*, 172 Fed. 82,  
*Chicago R. Co. v. Dutcher*, 182 Fed. 494,

*Allard v. Contract Co.*, 64 Wash. 14,  
*McLellan v. Fuller*, 226 Mass. 374,  
*Moore v. R. Co.*, 185 N. C. 189,  
*Waiswilla v. R. Co.*, 220 Ill. App. 113,  
*Coast Ship Co. v. Yeaker*, 120 Miss. 152,  
*Cement v. Brown*, 45 Okla. 476,  
*Brown v. Sessler*, 128 Tenn. 665,  
*Arveson v. Boston etc. Wharf*, 128 Minn. 178,  
*United v. Kuchan*, 253 Fed. 425,  
*Preston v. R. Co.*, 292 Mo. 442,  
*Richmond v. Bailey*, 92 Va. 554,  
*Schoen v. R. Co.*, 112 Minn. 38,  
*McKee v. R. Co.*, 151 Ky. 698,  
*McCalley v. R. Co.*, 169 Ky. 47,  
*Huxoll v. R. Co.*, 99 Neb. 170,  
*Curran v. R. Co.*, 211 N. Y. 60,  
*Illinois v. Ziemkowski*, 220 Ill. 324,  
*Peters v. George*, 154 Fed. 634,  
*Western Electric v. Hanselman*, 136 Fed. 564,  
*Maloney v. Stetson*, 46 Wash. 645,  
*Cole v. Gerrick*, 62 Wash. 226,  
*Comrade v. Atlas*, 44 Wash. 470,  
*Cunningham v. Adna*, 71 Wash. 111,  
*O'Brien v. Page*, 39 Wash. 537.

From what has been said, and from what will follow, the modern trend should be in favor of the courts holding that the giving of signals, where they must be used to assure the men a safe place to work, and without which the work could not be done expeditiously, is a primary duty of the master which he cannot delegate.

"The trend of modern decisions, however, is in favor of holding the employer liable for a neglect of monitory signals as well as general instructions."

18 R. C. L. p. 734,

*Cook v. Camp*, supra.

The Supreme Court of the United States applied the warning and signal doctrine.

This Court long ago paved the way for the more enlightened state courts to follow. In 1880 Justice Harlan said in *Hough v. Texas R. R. Co.*, 100 U. S. 213, "There are well defined exceptions (to the fellow servant doctrine) resting upon principles of justice, expediency and public policy." Earlier in 1874, *Union Pacific v. Fort*, 17 Wall, 553, 21 Law Ed. 739, this Court held that a coworker who failed to warn an inexperienced employee of the dangers of moving machinery was not a fellow servant of the injured employee, but that the duty of warning such an employee was non-delegable. In 1883, *Wabash v. McDaniels*, 17 Otto 454, 27 Law Ed. 605, one McHenry "fell asleep at the switch" and because of which a collision occurred injuring the respondent. This Court there held that it was the duty of the employer to safeguard the lives of his employees, and the failure to do so was negligence of the employer, and not that of a fellow servant. In 1885, *Mather v. Rillston*, 156 U. S. 391, this Court held that an employee was entitled to warnings of danger in certain occupations. In 1906, *Sante Fe v. Holmes*, 201 U. S. 438, (overruling *Northern Pacific v. Dixon* cited by petitioner) Justice McKenna in a vigorous opinion held that a train dispatcher (whose duties were

similar to those of the hatch tender here) represented the master; that the duty of giving warnings or information of moving trains was the duty of the employer, and better still, a continuous duty, and for any failure to perform such a duty was the negligence of the master, and not that of a fellow servant. In 1909, *Kreigh v. Westinghouse*, 214 U. S. 255, where the plaintiff was injured by a swinging bucket the court reversed the lower court which had granted a non suit, stating that whether or not the plaintiff had reason to expect a warning was a question for the jury. In the case of *Standard Oil v. Brown*, 218 U. S. 78, Justice McKenna held that the failure of a coworker to give the customary warning or signal of the lowering of a bale of hay through a ceiling was not the negligent act of a fellow servant, but a duty imposed upon the employer.

Summarizing the cases herein cited we can say that this Court has held with the common law courts that the duty of giving warnings and signals of dangerous and moving operations where those warnings are expected and customarily given is a primary duty of the master, which cannot be delegated. Without such warnings the place would be unsafe, and the life of the employee would be always endangered.

The cases cited by petitioner are, with one or two exceptions—and which will be discussed later—distinguishable from the present one because here the employer agreed to warn the respondent of the lowering of loads, and further agreed not to lower a load whilst he was in the open hatchway engaged in stowing away a preceding

load. To hold otherwise would be to sanction violations of working agreements, promises made to lull a servant into a sense of security; a gross and inequitable doctrine contrary to public policy of the twentieth century. But a more important reason is that petitioner's cases do not now state the law as will presently appear.

(B4) The States abrogated the fellow servant doctrine by the progressive enactment of Fellow Servant, Employers Liability and finally Workmen's Compensation Acts.

As a result of some of the courts failing to keep step with the tremendous changes taking place in industry since 1841, the legislatures enacted laws favorable to employees. Commencing in 1880 when England passed Lord Campbell's Act, 43 and 44 Vict. Chapter 42, the legislatures in this country at one time or another passed either Fellow Servant or Employers Liability Acts. 18 R. C. L. 821-824. And finally many passed Workmen's Compensation Acts, 28 R. C. L. 712; *Labatt's Master & Servant*, Vol. 8, 2nd Ed. p. 8864 et seq., which threw the fellow servant doctrine together with all of its modifications onto the legal scrap heap. In enacting the latter a new concept for compensation to injured employees was introduced, a new public policy of treating industrial employees was formulated, the result of social experience and wisdom. Its introduction was bitterly contested. Answering the argument that the fellow servant doctrine was inviolate, Judge Burch said:

"They (speaking of common law principles of fellow servant and assumption of risk) are court-made rules invented to meet certain ideals of justice

respecting certain social and economic conditions and relations. Should the conditions and relations be completely changed and those ideals wholly fail of realization, the reason for the rules, which is the life of all rules of the common law, would then be wanting, and the court which would go on enforcing them would be a conscious minister of injustice and not of justice." *Burgin v. M. K. & T. Ry. Co.*, 90 Kan. 194 (1913).

(B 5) Congress abrogated the fellow servant doctrine by enacting the Federal Employers Liability Act.

To make a uniform public policy throughout the country Congress in 1908 passed the Federal Employers Liability Act.

18 R. C. L. 825.

Immediately following its passage the act was bitterly attacked. Justice Vandevanter, in answer to the argument that the fellow servant doctrine was "sacred," stated that there was nothing sacred about any common law principle. "A person has no property, or vested interest, in any rule of the common law."

2nd Employers Liability Cases, 223 U. S. 1.

With the passing of the Federal Employers Liability Act in 1908 all cases in opposition to the principle announced by Congress should logically be shelved as not stating the law in 1926. The following railroad cases cited by petitioner must be regarded as being not in conformity with present public policy, if not obsolete:

*Randall v. Baltimore*, 109 U. S. 478,

*Northern Pacific v. Charless*, 162 U. S. 359,  
*Martin v. Atchison*, 166 U. S. 399,  
*Northern Pacific v. Dixon*, 194 U. S. 339,  
*Texas, etc., v. Baurman*, 212 U. S. 536.

(B 6) Under both the common law and Federal Employers Liability Act the duty of giving signals and warnings is a non-delegable duty.

On the other hand all those cases cited by us in (B 3) being in agreement with the new concept as laid down by Congress and based upon legal and social experience gained from the study of new employment relations, should be decisive in this case. The law, in any event, whether we apply the common law or the Federal Employers Liability Act, is well settled, that "a servant has the right to rely on signals and warnings customarily given in the conduct of the business in which he is engaged, and if the master fails to give these he is negligent." See *St. Louis, etc. v. Jeffries*, 276 Fed. 73, 75, where the cases under both principles of law have been collected.

Other cases are:

*Federal Mining Co. v. Anderson*, 247 Fed. 472,  
*Collins v. Barner*, 268 Fed. 699,  
*Brown v. Pacific Coal Co.*, 241 U. S. 571,  
*Labatt's Master & Servant*, 2nd Ed. p. 4308, and  
 p. 2936.  
*McGovern v. Philadelphia*, 235 U. S. 389,  
*Lehigh Valley v. Doktor*, 290 Fed. 760,  
*B. & O. v. Robertson*, 300 Fed. 314,  
*Hogan v. Killen*, 265 Fed. 614,



*Director General of Railroads v. Templin*, 268 Fed. 483,

*Glacken v. Cincinnati*, 209 Ky. 28,

*Reed v. Director General of Railroads*, 258 U. S. 92,

See cases cited in B 3.

### “C”

#### Master and Servant Relations on Water

The doctrine of fellow service in Admiralty.

Before entering into a discussion of the applicability of the doctrines presented by the parties to maritime torts, it will be both interesting and relevant to trace the changes in the ship's personnel, from galleyman to the amphibious longshoremen. The maritime law we shall also observe, attempted to keep pace with these changes by paralleling them with the establishment of new employment theories. Fitted in with a setting of changing ships and shipping relations the necessity for new legal policies—judicial and legislative—will be readily apparent.

“The law of the sea is not the product of any one brain, or any one age. It is the growth of experience, expanding with the expansion of commerce, and fitting itself to commercial necessities. It is properly a part of the law merchant on account of their intimate connection; and grew, not from enactment, but from custom; not from the edict of kings, but from the progressive needs of society.”

Hughes on Admiralty, 2nd Ed. pp. 4, 5.

Benedict on Admiralty, 5th Ed. p. 724 et seq.

Benedict on Admiralty, 4th Ed. p. 4.

Just as the development of the common law is wrapped up in the evolution of agriculture, commerce, finance, and industry, so is the maritime law enveloped in the growth of ships and shipping. Without ships and shipping Admiralty Law is unthinkable. The building of the two, three, four and five-story rowing vessels of the ancients, the Mediterranean Galleon of the Middle Ages, and the "Square Rigger" of the 18th century, and finally the steel steamship of today with its thousands of horsepower engines, all tell one grand story of man's glorious efforts to supply the world's needs across the water. With the changes in ships also came changes in the personnel of the ships' crew. The galley-men of the five-story rowing vessel were displaced by the sailors of the Galleon and the Square Rigger. Today, on the steel steamship, the ship's personnel consists of sailors, firemen, oilers, machinists, electricians, boilermakers, carpenters, waiters, barbers, freight clerks and a host of others. The ship of today is, in many instances, a floating city. In port, stevedores, riggers, riveters, caulkers, watchmen, and many others are employed on board ship. From this kaleidoscopic review we can see that with the evolution of the ship has come an increasing number of specialized details necessary to the general operation of the ship. All are intimately connected up with the general process of navigation, the carriage of passengers and freight. The work of longshoring is just as important to the safety to the vessel as is the steering.

“Upon its performance (the loading and stowing of cargo) depend in a large measure the safe carrying of the cargo and the safety of the ship itself; and it is a service absolutely necessary to enable the ship to discharge its maritime duty. Formerly the work was done by the ship's crew, but, owing to the exigencies of increasing commerce and the demand for rapidity and special skill, it has become a specialized service devolving upon a class *“as clearly identified with maritime affairs as are the mariners.”* (citing cases.)

Justice Hughes in *Imbroke* case.

“The law is the outgrowth of man's needs in society” (Lee, *Historical Jurisprudence*, p. 1), and “with changes in the prevailing economic conditions (they) necessarily involve corresponding alterations in the law” (Loria, *Economic Foundations of the Law*, p. 240, Vol. 3, “*Evolution of Law Series*”). New business conditions, relations and agreements whether on land or sea require the application of new legal principles. New standards of legal conduct in shipping relations followed in the wake of the ship's growth. “Economics and law considered as static phenomena are related as content and form; but both are subject to change, the one continuously, the other (law) from time to time.” (Berolzheimer, p. 22, “*World's Legal Philosophies*,” *Modern Legal Philosophy Series*.)

Sensing the great changes in the shipping world the past century the great majority of the judges, sitting in maritime cases, involving the relations of master and servant, did not wait for Congress to act, but reached out their hands and brought into the maritime law legal principles adopted from the medieval age, from England,

from the Common Law, from the States, and from Congress in an endeavor to approximate the law to the rapidly changing shipping conditions. They did as Pickard, the great Belgian writer said, "We must sense the evolution of law. Otherwise our knowledge lacks clearness and permanence. Our work is done at random, amidst the darkness of our guesses, on an ocean of chimeras." Pickard, p. 678, Vol. 3, "Evolution of Law Series."

(C 1) The "maintenance, wage and cure doctrine" gives to seamen the right of recovery for injury received in the course of his employment regardless of the negligence of the act of a co-seaman.

For centuries the maritime law has been that a shipowner is liable to a servant injured in the courts of his employment for his maintenance, wage and cure for the length of the voyage, regardless of the person or thing causing the injury.

*Harden v. Gordon*, 2 Mason, 541; 11 Fed. Cases, 480,  
*The Osceola*, 189 U. S. 158.

That doctrine negatives placing the responsibility upon a fellow servant for an injury.

*Washington v. Dawson Co.*, 264 U. S. p. 232, Opinion of Justice Brandeis.

(C 2) Admiralty borrowed the "seaworthy" doctrine from England.

When the changes were made in the middle of the 19th century in the structure of ships from wood to iron, and

in propulsion from sail to steam, the English Parliament in 1876 provided that the shipowner shall be liable, even in the absence of negligence; for an injury received by a seaman from the unseaworthiness of the vessel. American admiralty courts adopted that doctrine.

*Merchants Shipping Act* of 1876, 29 and 40 Victoria, Chapter 80, Sec. 5,

*The Osceola*, *supra*,

*Washington v. Dawson*, *supra*.

The word seamen as a result of the changes in the ship's structure, and mode of transportation was broadened to include firemen, coal passers, oilers, and others in the engineering department, as well as those engaged in the steward's department, waiters, etc. They all signed ship's articles and went on voyages.

(C3) The United States Supreme Court, the inferior Federal Courts and the State Courts adopted in admiralty cases the progressive features—the safe place to work rules—of the common law doctrine of fellow service.

“Owing to the exigencies of increasing commerce and the demand for rapidity and special skill” (Justice Hughes in the *Imbrovek* case) “the longshoreman was brought into existence” an amphibious creature, who works on land or water, as the duty of loading and unloading requires, and who signs no ship's articles, and goes on no voyages.

The two maritime principles just stated are inappli-

cable to his case, when injured, for he has no contractual relations with the ship or the ship owner; in most cases he is hired by a stevedore or stevedoring company as in this case.

In the seventies and the eighties when this new species was injured the admiralty courts, recognizing that the medieval and English principles just cited could not be stretched to fit his case, stepped over into the common law—reasoning by analogy, and borrowed the common law doctrine of fellow service as it then prevailed. Then, as previously stated, the fellow servant doctrine—either the “common employment” concept or the “operative detail” concept—made every employee with few exceptions a fellow servant. *The Harold*, 21 Fed. 428 (1884), the earliest of the federal cases cited by petitioner, aside from the fact that it is in opposition to *Standard Oil v. Anderson*, 212 U. S. 215, is based upon the common law conception of fellow service of 1841. So is the case of *Quinn v. N. J. Lighterage*, 23 Fed. 363, (1885) and the *Queen*, 40 Fed. 694.

But with the passage of a generation the Federal and State courts hearing longshoremen cases adopted the modifications of the fellow servant doctrine of 1841, including the Ninth Circuit. The only exception was in the case of winch drivers. By the repetition of the use of the *Harold*, *Quinn* and *Queen* cases it became a simple matter for that circuit to decide the pending case—where the injury was caused by the negligence of the winch driver (although here it is the hatch tender)—by referring to the earlier cases as decisive. According to the

new school of "Behaviorism" or "Freudianism" that circuit has developed a "winch driver complex." Neither the Hoquiam and later cases advance any reasons for their holdings. The judicial method employed in these instances has been aptly described by Dean Roscoe Pound as a "judicial slot machine," p. 170, "Spirit of the Common Law," as follows: "The theory . . . has made of the court a sort of judicial slot machine. The necessary machinery had been provided by legislation or by received legal principles and one had but to put in the facts above and take out the decision below. True, the facts do not always fit the machinery, and hence we may have to thump and joggle the machinery a bit in order to get anything out. But even in extreme cases of this departure from the purely automatic, the decision is attributed not at all to the thumping and joggling process, but solely to the machine."

Except in the winch driver cases, the Ninth Circuit, together with the State Courts, the other Federal Courts, and this court, sensed the need for modifying the doctrine of fellow service. They applied the safe place to work rule and the other progressive features of the common law. The following are a few of the longshoremen cases decided by the State Courts where the non-delegable duty doctrine was applied:

*Anderson v. Globe*, 57 Wash. 502,  
*Westlund v. Rothchild*, 53 Wash. 626,  
*Jacobsen v. Rothchild*, 62 Wash. 127,  
*Norman v. Shipowners*, 59 Wash. 244,  
*Keating v. Pacific*, 21 Wash. 415,

*Nelson v. Willey*, 26 Wash. 548,  
*Carlson v. White Star*, 39 Wash. 394,  
*Anderson v. Pittsburgh*, 108 Minn. 455 (1910).

In the *Anderson* case, last cited, Judge Jaggard in an excellent decision (1910) traces the evolution of opinion of both State and Federal courts in winch driver and hatch tender cases. Therein he criticises the earlier cases cited by petitioner, for example, *Herman v. Port Blakely Mill* (1896), *Ocean S. S. v. Cheeny* (1890), and *Portance v. Coal Co.* (1898). His conclusion is that where the place is unsafe, and the employer has agreed to give a warning of danger, the person charged with such duty is a vice principal. The *Anderson* case has been consistently followed to date. See *Cook v. Camp*, 183 N. C. 48 (1921); *Glacken v. Cincinnati*, 209 Ky. 28 (1925).

The vice principle doctrine has been applied by the Federal Courts (including the Ninth Circuit) in longshoremen cases:

*The Buffalo*, 154 Fed. 815,  
*The Buffalo*, 147 Fed. 304,  
*Benedict on Admiralty*, 5th Ed. 33,  
*Panama v. Minnix*, 282 Fed. 47,  
*Magdaline*, 91 Fed. 798,  
*The Howell*, 273 Fed. 513,  
*Kinghorn*, 297 Fed. 621,  
*Alaska Pacific v. Egan*, 202 Fed. 867,  
*Flynn v. Christensen*, 273 Fed. 385,  
*Pioneer*, 78 Fed. 600,  
*Galley v. Smith*, 272 Fed. 999,  
*City of Antonio*, 143 Fed. 955,



*Victoria*, 69 Fed. 160,  
*Boveric*, 167 Fed. 520,  
*Gladestry*, 128 Fed. 591,  
*Lisnacrieve*, 87 Fed. 570,  
*Pac. Am. Fisheries v. Hoof*, 291 Fed. 306,  
*Siebert v. Patapsco*, 253 Fed. 685.

This Court has in several cases refused to apply the fellow servant doctrine in "water" longshoremen cases. In *Standard Oil v. Anderson* (1909), 212 U. S. 215, a winch driver case, the employer argued strenuously for the application of that doctrine contending that the winch driver, gangman, and the injured longshoreman were all performing details of a general operation. This Court held that the giving of signals was not a giving of orders but of information, the same as it held in *Santa Fe v. Holmes*, *supra*.

In *Atlantic Transport Co. v. Imbrovek*, *supra*, the petitioner also contended for the application of the fellow servant doctrine, and again this Court applied the non-delegable duty doctrine, i. e., the servant was entitled to a safe place to work.

In the case of *Western Fuel v. Garcia*, 257 U. S. 233, where the Ninth Circuit held that the decedent and the winch driver were fellow servants, 260 Fed. 839 (by reference to the very early cases), this court, instead of affirming the case on that doctrine which would have disposed of it immediately, went into the questions of the applicability of the State Statutes of California to the issue. By doing so the inference is that the fellow servant doc-

trine was not an essential feature of the maritime law.

From the above it is obvious that in longshoremen cases the State and Federal Courts, and this Court, have adopted as part of the maritime law the modifications of the fellow servant doctrine of 1841, the safe place to work rule, i. e., whoever is charged with making the place safe to work whether by putting in pins or by warning, such a person is a vice principle.

(C 4) Admiralty adopted as part of the maritime law local features, State Statutes, where they did not contravene an essential feature of the maritime law.

Although neither admiralty nor the common law permitted the representative of a deceased employee injured in the course of his employment on a vessel to recover full indemnity admiralty applying equitable principles adopted State Statutes which granted such rights. "Admiralty applies equitable principles," *Kalfarli*, 277 Fed. 391; *Benedict on Admiralty*, 5th Ed. pp. 95, 97.

*The Hamilton*, 207 U. S. 398,

*Western Fuel v. Garcia*, supra,

*Great Lakes v. Kierejewski*, 261 U. S. 479.

Admiralty will enforce a maritime agreement to arbitrate differences.

*Red Cross Line v. Atlantic Fruit*, 264 U. S. 109.

Admiralty will enforce a compensation statute where the parties have agreed to accept compensation in lieu of a suit at law.

*Millers', etc. v. Brand*, decided Feb. 1, 1926, Adv. Op.

(C 5) Congress established a new public policy in employment relations on water by introducing the law the vice principle doctrine.

To keep pace with the great changes in shipping conditions and in line with the legal policies as formulated by the common law courts, Congress, in 1915, delimited the fellow servant doctrine in its application to seamen, passing Sec. 20, Act of March 4, 1915, 38 Stat. at L. Chap. 153, p. 1185:

“In any suit to recover damages for any injury sustained on board vessel or in its service seamen having command shall not be held to be fellow servants with those under their authority.”

This statute attempted to introduce into the maritime law the vice principle doctrine.

(C 6) Congress abrogated the fellow servant doctrine by enacting the Jones Act.

To bring the rights of maritime employees on a par with interstate commerce servants Congress in 1920 swept into “Davy Jones’ Locker” the doctrine of fellow service.

Sec. 33 of the Act of June 5, 1920, Chap. 250, 41 Stat. at L. 1007.

“Sec. 33. That section 20 of the Act of March 4, 1915, be, and is, amended to read as follows:

“ ‘Sec. 20. That any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of

personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the Court of the district in which the defendant employer resides or in which his principal office is located'."

This statute brought into admiralty a large body of land principles, which prior to its enactment were denied to seamen. On land and on water public safety has decreed against the fellow servant doctrine.

*Panama v. Johnson*, 264 U. S. 375.

The Act of 1920 and the Panama case have by implication overruled the seamen cases cited by petitioner in its brief on pages 10 and 11. The purpose of the Jones Act was to avoid the mischief rendered by the application of the *Osceola*, *Quebec v. Merchant*, *Carlisle v. Sandanger* and other seamen cases which stated what the law formerly was. To use them now is to do violence to an act of Congress, and go contrary to the dictates of public policy.

*Panama v. Johnson*, supra.

*Green Star v. Nanyang*, 3 Fed. (N. S.) 369,

*South & Central American v. Panama*, 237 N. Y. 287.

(C7) Under both the common law and Jones Act (Federal Employers Liability Act) the duty of warning is a non-delegable duty.

With the passage of the Jones Act and the rendition of the Panama case the law of master and servant on sea has been brought into uniformity with the laws of master and servant in railway cases. The law as administered by the common law courts requires that the master give warnings and signals to his employees where such warnings are necessary to make the working place safe. The same law is required in railroad cases.

*St. Louis v. Jeffries*, supra,

*Cook v. Camp*, supra,

*Anderson v. Pittsburg*, supra.

(C 8) The application of the monitory signal doctrine will not destroy the uniformity of the maritime law.

From what has been said the fellow servant doctrine was never an essential feature of the maritime law. Moreover it has been discredited on land or water by the courts and by the legislatures as follows:

#### *On Land*

The common law or land courts modified it by introducing many exceptions;

The legislatures abrogated it by enacting Workmen's Compensation Acts;

Congress abrogated it by enacting the Federal Employers' Liability Act.

#### *On Water*

Admiralty courts have modified it by applying the many exceptions;

Congress modified it by enacting the vice principle doctrine in 1915;

Congress abrogated it by enacting the Jones Act in 1920.

Public policy, both judicial and legislative, have decreed against it. Since 1841 when the doctrine of fellow service was first announced, the world, commerce and law, has moved forward. Moreover, the principle contended for by the respondent, to-wit, "a servant has the right to rely on signals and warnings customarily given in the conduct of the business in which he is engaged, and if the master fails to give these, he is negligent," is supported by the common law and by the Jones Act. Its application to the case at bar will work no material prejudice to the uniformity of the maritime law. If anything at all, it will make for uniformity, for it has the sanction of both judicial and legislative authority, and is in keeping with the "principle of justice, expediency and public policy." (*Hough v. Texas*, supra.)

For the reasons stated, the decision of the Washington Supreme Court should be affirmed.

Respectfully submitted,

JOHN F. DORE,

MARK M. LITCHMAN,

*Attorneys and Counsel for Respondent.*

**AMICUS**

**CURIAE**

**BRIEF**

U.S. DEPARTMENT OF AGRICULTURE  
BUREAU OF PLANT INDUSTRY  
WASHINGTON, D. C.

# REPORT OF THE COMMISSIONER OF PLANT INDUSTRY

FOR THE YEAR 1908

BY  
J. H. HARRIS

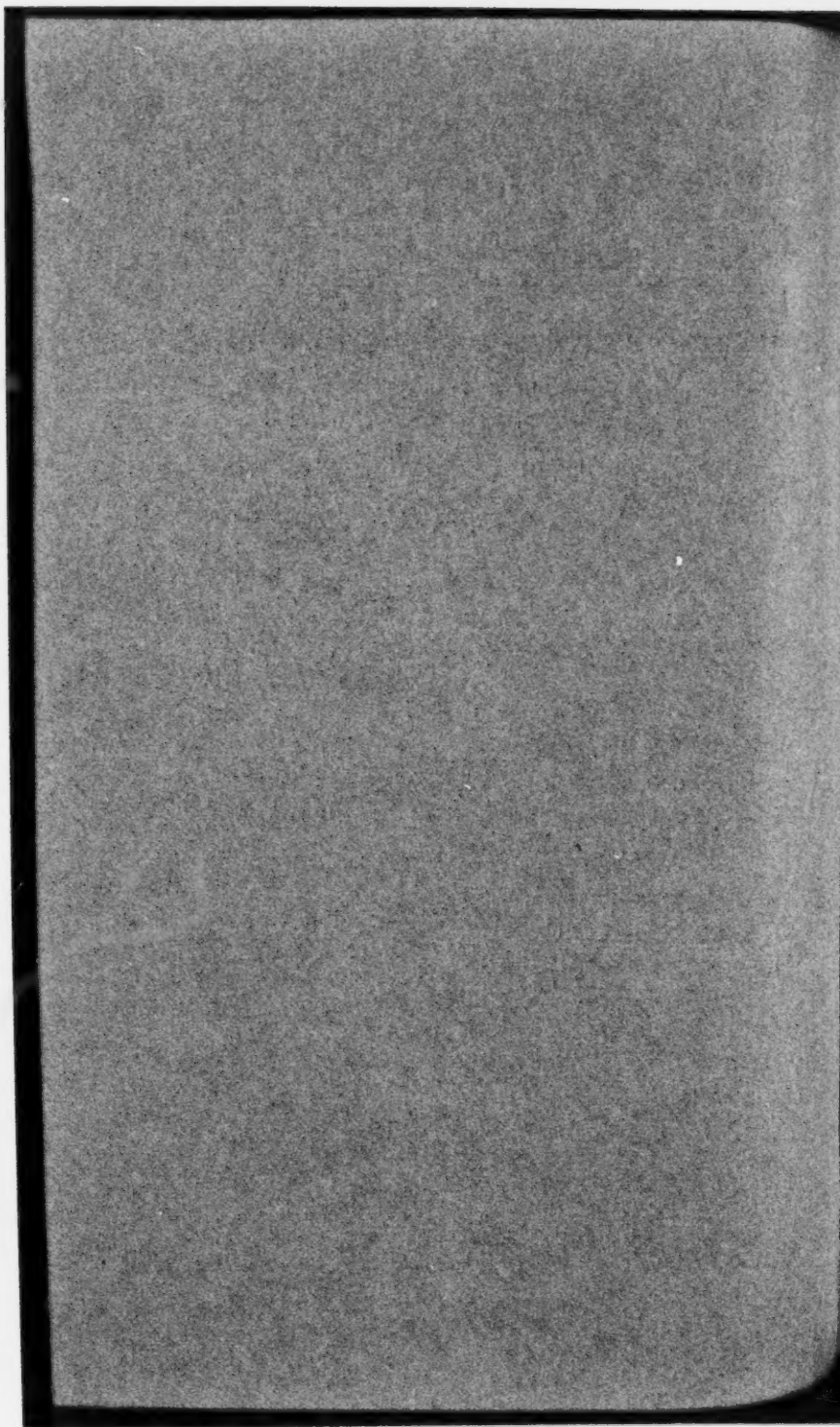
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OFFICE OF THE COMMISSIONER OF PLANT INDUSTRY  
WASHINGTON, D. C.





No. ....

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# Supreme Court of the United States

OCTOBER TERM, 1926

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INTERNATIONAL STEVEDORING COMPANY,  
a corporation,

*Petitioner,*

vs.

R. HAVERTY,

*Respondent.*

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WRIT OF CERTIORARI TO THE SUPREME COURT OF THE  
STATE OF WASHINGTON

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## BRIEF OF AMICI CURIAE

ARTHUR E. GRIFFIN,  
GEORGE F. VANDERVEER,  
SAMUEL B. BASSETT,  
*Amici Curiae.*

Office and Postoffice Address:  
818 Alaska Building, Seattle, Washington.



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No.....

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# Supreme Court of the United States

OCTOBER TERM, 1926

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INTERNATIONAL STEVEDORING COMPANY,  
a corporation,

*Petitioner,*

vs.

R. HAVERTY,

*Respondent.*

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WRIT OF CERTIORARI TO THE SUPREME COURT OF THE  
STATE OF WASHINGTON

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## BRIEF OF AMICI CURIAE

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### STATEMENT OF THE CASE

This is an action by a longshoreman to recover from his employer damages for personal injuries sustained while engaged in stowing cargo in the hold of a vessel. The accident was occasioned by the negligence of the hatch-tender in failing to give the customary and necessary warning signal about the movement of the cargo sling. Both the longshoreman and his employer, the master stevedore, are citizens of the State of Washington. Neither the vessel nor her owners are parties to the action. The vessel in question was moored to a dock in the Port of Seattle, Washington, and the

plaintiff was temporarily aboard to assist in loading a cargo of wool.

The Supreme Court of the State of Washington has in effect held that, in determining whether the hatch-tender and the respondent were fellow-servants, the state court cannot apply the common law of the state, but must be governed by the decisions of the admiralty courts. *R. Haverly vs. International Stev. Co.*, 134 Wash. 235, 235 Pac. 360.

The petitioner contends that the court's holding in this respect is correct, but urges that the court erred in further holding that, under the decisions of the admiralty courts, the hatch-tender is a vice-principal and not a fellow-servant of the respondent. The case is here for review on a Writ of Certiorari. The only question which we will discuss in this brief may be briefly stated as follows:

### THE QUESTION

The tort being maritime, but purely local, and neither the vessel nor her owners being parties to the action, may a state court having jurisdiction of the parties apply its own fellow-servant rules, if to do so would neither work material prejudice to the characteristic features of the general maritime law nor interfere with the proper harmony and uniformity of that law?

## ARGUMENT

## I.

**COMMON LAW COURTS HAVE ALWAYS HAD JURISDICTION CONCURRENT WITH ADMIRALTY COURTS OF ALL ACTIONS IN PERSONAM TO RECOVER DAMAGES FOR MARITIME TORTS.**

In order to discuss the question intelligently, it is first necessary to consider the meaning of Article 3, Section 2 of the United States Constitution, which extends the judicial power of the United States "to all cases of admiralty and maritime jurisdiction" and Section 9 of the Judiciary Act of 1789 which confers upon the United States District Courts,

"exclusive, original cognizance of all civil causes of admiralty and maritime jurisdiction \* \* \* saving to suitors, in all cases, the right of a common law remedy where the common law is competent to give it." (Judicial Code, Sections 24 and 256).

Before the adoption of the Constitution the common law courts exercised concurrent jurisdiction with admiralty courts in all causes of maritime cognizance where the plaintiff could proceed *in personam*,

Storey's Commentaries on the Constitution,  
5th Edition, Section 1666;

*Taylor vs. Carryl*, 15 L. Ed. 1028;

*Southern Pac. Co. vs. Jensen*, Opinion of  
Mr. Justice Pitney, 61 Ed. 1086, 1103.

The concurrent jurisdiction of the common law courts in such cases was neither taken away nor disturbed by the grant of admiralty jurisdiction to the United States. Mr. Justice Storey in his Commentaries on the Constitution, *supra*, Section 1166 says:

"The reasonable interpretation would seem to be that it conferred on the national judiciary the admiralty and maritime jurisdiction, exactly, according to the nature and extent and modifications in which it existed in the jurisprudence of the common law. When the jurisdiction was exclusive, it remained so when it was concurrent, it remained so. Hence the States could have no right to create courts of admiralty as such, or to confer on their own courts the cognizance of such cases as were exclusively cognizable in admiralty courts. But the States might well retain and exercise the jurisdiction in cases of which the cognizance was formerly concurrent in the courts of common law. The latter class can be no more deemed cases of admiralty and maritime jurisdiction than cases of common law."

This is quoted with approval by this court in *Taylor vs. Carryl*, 15 L. Ed. 1028, and by Mr. Benedict in his work on Admiralty (5th Addition, Section 20). Mr. Justice Nelson speaking for the Court in *New Jersey Steam Nav. Co. vs. Merchants Bank*, 12 L. Ed. 465, expressed the same views; so did Mr. Justice Holmes in *The Hamilton*, 207 U. S. 398; and Mr. Justice Pitney, in the *Jensen*

case, *supra*, after a scholarly and exhaustive investigation of the subject concludes as follows: (Pages 1106 and 1107).

"The grant of judicial power in cases of admiralty and maritime jurisdiction never has been construed as exceeding the jurisdiction of the courts of common law over civil causes that, before the constitution, were subject to the concurrent jurisdiction of the courts of admiralty and the common law courts. The first congress did not so construe it as the saving clause in the Judiciary Act conclusively shows. And, assuming that the states, in the absence of legislation by Congress, would be without power over the subject matter, this saving clause, still maintained upon the statute book, is a sufficient grant of power. Jurisdiction in prize cases, as has been shown, springs out of the possession of a prize of war. Civil proceedings in *rem*, to be mentioned hereinafter, are based upon the maritime lien, where possession in the claimant is neither necessary nor usual as is the case with common law liens. With these exceptions, both resting upon grounds peculiar to the forum of the admiralty, concurrent jurisdiction of the courts of common law in civil cases of maritime origin always has been recognized by this court." (Citing cases).

#### A.

#### **THE CONCURRENT JURISDICTION OF THE COMMON LAW COURTS INCLUDES THE POWER TO APPLY COMMON LAW RULES OF DECISION.**

In *Knickerbocker Ice Co. vs. Stewart*, 253 U. S. 149, Mr. Justice Holmes, speaking of the saving clause, said:



"The saving of a common law remedy adopted the common law of the several states within their several jurisdictions \* \* \*"

Prior to the decision of this court in the case of *Chelentis vs. Luckenbach, S. S. Co.*, 247 U. S. 372, the power of the common law courts to apply the state rules of fellow service and contributory negligence in all civil cases involving maritime torts, was unquestioned.

*Keating vs. Pacific Steamship Whaling Co.*, 21 Wash. 415, 48 Pac. 224; (Seamen. Vice Principal doctrine applied);

*Nelson vs. Willey Steamship & Nav. Co.*, 26 Wash. 548; (Seamen. Vice principal doctrine applied);

*Carlson vs. White Star S. S. Co.*, 39 Wash. 394; (Third officer of vessel directing loading, held vice principal of longshoremen);

*Woods vs. Globe Nav. Co.*, 40 Wash. 376, 82 Pac. 401; (Seamen. Common law applied. Master of ship held vice principal);

*Anderson vs. Globe Nav. Co.*, 57 Wash. 502; (Longshoreman. Hatch-tender held vice principal where he failed to give warning signal);

*Westerlund vs. Rothschild*, 53 Wash. 626; (Longshoreman. Hatch-tender gave wrong signal. Held vice principal);

*Norman vs. Ship Owners Stev. Co.*, 59 Wash. 244; (Longshoreman. Failure to give warning signal. Hatch-tender held a vice principal);

*Jacobson vs. Rothschild*, 62 Wash 127;  
(Longshoreman. Duty of master to give  
warning signal held non delegable. Local  
common law applied);

*Larsen vs. Alaska Steamship Co.*, 96 Wash.  
655; (Seamen. Boatswain directing work  
held vice principal);

*Wilson vs. McKenzie*, 7 Hill 95, 42 Am.  
Dec. 51;

*Gabrielson vs. Waydell*, 31 N. E. (N. Y.)  
969;

*Kalleck vs. Deering*, 161 Mass. 469, 37 N. E.  
450;

*Anderson vs. Pittsburg Coal Co.*, 122 N. W.  
(Minn.) 794.

## B.

**THIS COURT SANCTIONED THE APPLICATION, BY  
THE STATE COURTS, OF COMMON LAW RULES OF  
DECISION IN CIVIL CASES OF MARITIME ORIGIN.**

Moreover, this court had repeatedly sanctioned  
the application by the state courts of their own com-  
mon law rules of decision in the exercise of their  
concurrent jurisdiction in civil cases of maritime  
origin.

*Atlee vs. Northwestern Union Packet Co.*,  
21 Wall. 389;

*The Maa Morris*, 137 U. S. 1;

*Belden vs. Chase*, 150 U. S. 674;

*The Steamboat New York vs. Rea*, 18 How.  
223;

*The Atlas*, 93 U. S. 302;

*The Hamilton*, 207 U. S. 398, 52 L. Ed. 264;

In *Atlee vs. Northwestern Union Packet Co.* 21 Wall. 389, 395-396, the Court said:

"The plaintiff has elected to bring his suit in an admiralty court, which has jurisdiction of the case, notwithstanding the concurrent right to sue at law. In this court the course of proceeding is in many respects different and the *rules of decision are different* \* \* \*. An important difference, as regards this case, is the rule for estimating damages. In the common law court the defendant must pay all the damages or none. If there has been on the part of plaintiffs such carelessness or want of skill as the common law would esteem to be contributory negligence, they can recover nothing. But the rule of the admiralty court, where there has been such contributory negligence, or, in other words, when both have been in fault, the entire damages resulting from the collision must be equally divided between the parties \* \* \*. Each court has its own set of rules for determining these questions, which may be in some respects the same, but in others vary materially."

In the *Mar Morris*, 137 U. S. 1, a libel by a stevedore, to recover damages for personal injuries, this court applied the maritime rule of divided damages, saying,

"We think this rule is applicable to all cases of maritime tort founded upon negligence and *prosecuted in admiralty*, as in harmony with the rule for the division of damages in cases of collision." (Italics ours).

*Belden vs. Chase*, 150 U. S. 674, 691, was a collision case in which the plaintiff elected to pursue his common law remedy in a state court. This court held that the rights and liabilities of the parties must be measured by the principles of the common law and not by the maritime rules. The court said at p. 691:

"The doctrine in admiralty of an equal division of damages in the case of a collision between two vessels when both are in fault, contributing to the collision, has long prevailed in England and in this country. *The Max Morris*, 137 U. S. 1. But at common law the general rule is that if both vessels are culpable in respect of faults operating directly and immediately to produce the collision, neither can recover damages for injuries so caused. *Atlee vs. Northwestern Union Packet Co.*, 21 Wall 389.

"In order to maintain this action, the plaintiff was obliged to establish the negligence of the defendant, and that such negligence was the sole cause of the injury, or, in other words, he could not recover, though defendant were negligent, if it appeared that his own negligence directly contributed to the result complained of."

The principle deduced from the foregoing cases may be thus stated: If the jurisdiction is concurrent in the common law and admiralty courts, each court is at liberty to apply its own rules of decisions; or, in other words, if the action is litigated in a common law court the rights and liabilities of the parties are measured by the principles of the common law—if

litigated in a court of admiralty their rights and liabilities are measured according to the standards of the maritime law. This is still the law of the land, unless it can be said that the cited cases have been impliedly overruled by the following decisions upon which the petitioner relies.

*Southern Pacific Co. vs. Jensen*, 244 U. S. 205;

*Chelentis vs. Luckenbach Steamship Co.*, 247 U. S. 372;

*Knickerbocker Ice Co. vs. Stewart*, 253 U. S. 149;

*Washington vs. Dawson & Co.*, 264 U. S. 219;

*Robins Dry Dock & Repair Co. vs. Dahl*, 63 L. Ed. 372.

## II.

**THE JENSEN, KNICKERBOCKER ICE CO., DAWSON AND DAHL CASES HAVE NOT AFFECTED THE POWER OF THE STATE COURTS TO APPLY THE LOCAL COMMON LAW RULES OF MASTER AND SERVANT IN THE EXERCISE OF THEIR CONCURRENT JURISDICTION.**

In *Southern Pacific vs. Jensen*, 244 U. S. 205, this court held invalid the Workmen's Compensation Act of New York as applied to a longshoreman injured while discharging cargo from a vessel afloat in navigable waters, because

"the remedy which the compensation statute attempts to give is of a character wholly unknown to the common law, incapable of enforcement by the ordinary processes of any court, and is not saved to suitors from the grant of exclusive jurisdiction."

Conceding that state legislation may to some extent change, modify or effect the general maritime law, the court said:

"\* \* \* no such legislation is valid if it contravenes the essential purpose expressed by an act of Congress, or works material prejudice to the characteristic features of general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations."

*Knickerbocker Ice Co. vs. Stewart*, 253 U. S. 149, held invalid an Act of Congress amending the saving clause, which saves to suitors "in all cases the right of a common law remedy where the common law is competent to give it," by adding thereto the words "and to claimants the rights and remedies under the Workmen's Compensation Law of any state." The decision rests on two grounds:

(1) That the saving clause *preserves* but does not *create* remedies.

(2) That Congress cannot delegate to the various states the power to enact individual Workmen's Compensation Laws because "such an authorization

would inevitably destroy the harmony and uniformity which the constitution \* \* \* establishes." In other words, the Act was condemned for the reasons pointed out in the *Jensen* case.

The prime reason why the Workmen's Compensation Laws involved in the *Jensen and Knickerbocker Ice Co.* cases were condemned is briefly stated in *Red Cross Line vs. Atlantic Fruit Co.*, 68 L. Ed. 582, 587, as follows:

"The Workmen's Compensation Laws involved in *Southern Pacific Co. vs. Jensen*, 244 U. S. 205, 61 L. Ed. 1086 \* \* \* (citing other cases), and *Knickerbocker Ice Co. vs. Stewart*, 253 U. S. 149, 64 L. Ed. 834, were declared invalid, because *their provisions were held to modify or displace essential features of the substantive maritime law.*" (Italics ours).

*Washington vs. Dawson & Co.* 264 U. S. 219, is controlled by the principles laid down in the *Jensen* and *Knickerbocker Ice Co.* cases.

In *Robins Dry Dock & Repair Co. vs. Dahl*, the facts were these: The plaintiff, while employed by the Dry Dock Company and doing repair work on a vessel, then lying in navigable waters, was injured when a plank scaffold upon which he was standing broke and caused him to fall into the hold. His complaint alleged that the company failed to provide a safe scaffold as required by section 18 of the Labor

Laws of the State of New York which reads, as follows:

"Any person employing or directing another to perform labor of any kind in the erection, repairing, altering or painting of a house, building or structure, shall not furnish or erect or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, or other mechanical contrivances which are unsafe, unsuitable or improper and which are not so constructed, placed and operated as to give proper protection to the life and limb of a person so employed or engaged."

The plain effect of the statute is to constitute the employer an *insurer* of such scaffolding. The trial judge instructed the jury that they might consider its provisions in determining whether or not the defendant was negligent. This court held the instruction erroneous and said:

"The rights and liabilities of the parties arose out of and depended upon the general maritime law and could not be enlarged or impaired by the state statute."

The statute was held invalid because, like the legislation involved in the *Jensen* case and others cited by Mr. Justice Brandeis' in *Red Cross Line vs. Atlantic Fruit Co.*, it modified or displaced essential features of the substantive maritime law, and, further, because it interfered with the proper harmony and conformity of that law.



From the foregoing analysis of the *Jensen*, *Knickerbocker*, *Dawson* and *Dahl* cases, it is plain that there is nothing in those decisions which in the least militates against the power of the state court to apply the local common law rules of master and servant in actions to recover damages for maritime torts.

In each of those cases the court was dealing with remedies "wholly unknown to the common law," whereas, the instant case involves purely common law remedies. The application by the state court of the local fellow-servant rule to a longshoreman and his employer, would neither work material prejudice to the characteristic features of the general maritime law, nor interfere with the proper harmony and uniformity of that law; nor would it "modify or displace essential features of the substantive maritime law." *There is no substantive maritime law governing the rights of a longshoreman to recover damages for personal injuries sustained in the course of his employment.* The admiralty courts apply *common law principles* to sustain a libel, in personam, by a longshoreman against his master.

*Atlantic Transport Co. vs. Imbrovek*, 234  
U. S. 52;

*Port of N. Y. Stevedoring Corp. vs. Castagna*,  
280 Fed. 618 (certiorari denied 66 L.  
Ed. 801);

*Pacific American Fisheries vs. Hoof*, 291 Fed. 306, (C. C. A. 9th), (certiorari denied 68 L. Ed. 521);

*The Buffalo*, 154 Fed. 815 (C. C. A. 2nd);

*The Kinghorn*, 297 Fed. 621, (C. C. A. 2nd);

*Galley vs. Smith*, 272 Fed. 999, Affirmed 280, Fed. 972, (C. C. A. 1st);

*Alaska S. S. Co. vs. Egan*, 202 Fed. 867 (C. C. A. 9th);

*Carter et al vs. Brown*, 212 Fed. 393, (C. C. A. 5th);

*Carstensen vs. Hammond Lumber Co.*, 11 F (2d) 142, (C. C. A. 9th);

*The Portland*, 213 Fed. 699;

*Vanier vs. Sweet*, 243 Fed. 939;

*Siebert vs. Patapsco Ship Ceiling & Steve. Co.*, 253 Fed. 685.

In the *Buffalo*, supra, the Circuit Court of Appeals for the 2nd Circuit, said at page 817:

"The appellants contended that there can be no recovery in rem against the scow under the decision of the Supreme Court in *The Osceola*, 189 U. S. 158, 23 Sup. Court, 483, 47 L. Ed. 760. In answer to that contention it is sufficient to say that libellant was not a member of the crew of the scow. \* \* \* Libellant was merely a stevedore or longshoreman in the employ of appellants, and the case is to be determined by ordinary rules governing the relation of master and servant."

And since there is no *Federal* common law, *Wheaton vs. Peters*, 8 L. Ed. 1055, 1078; *Western Union Telegraph Co. vs. Call Pub. Co.*, 45 L. Ed. 765, 770, the common law which the admiralty courts apply in such cases must necessarily be the common law of the state in which the action is brought. As said by Mr. Justice Holmes in the *Jensen* case, at page 1101:

"If admiralty adopts common law rules without an act of Congress it cannot extend the maritime law as understood by the Constitution. *It must take the rights of the parties from a different authority just as it does when it enforces a lien created by a state.* The only authority available is the common law or statutes of a state." (Italics ours).

Under the uniform decisions of the Supreme Court of the State of Washington, the hatchtender in the performance of his duty to give warning signals to longshoremen employed in the hold of a vessel, is not a fellow-servant but a vice principal.

*Anderson vs. Globe Nav. Co.*, 57 Wash. 502;

*Westerlund vs. Rothschild*, 53 Wash. 626;

*Norman vs. Ship Owners Stev. Co.*, 59 Wash. 244;

*Jacobsen vs. Rothschild*, 62 Wash. 127.

The common law thus applied by both the state and admiralty courts neither conflicts with nor displaces the maritime law, but, like the state statutes

which give a substantive right to recover for wrongful death on the high seas, it merely *supplements* it. *Red Cross Line vs. Atlantic Fruit Co.*, 68 L. Ed. 582, 587.

*Western Fuel Co. vs. Garcia*, 66 L. Ed. 210;

*Great Lakes Dredge & Dock Co. vs. Kierejewski*, 67 L. Ed. 756;

*American S. B. Co. vs. Chase*, 21 L. Ed. 369;

*Sherlock vs. Alling*, 23 L. Ed. 819.

The comparative negligence rule is clearly a characteristic feature of the maritime law, applied without exception to all controversies not only between employer and employee, but between the vessels, themselves, and their owners. Yet this court has without exception permitted the common law courts to apply their own contributory negligence doctrine in causes of maritime cognizance.

*Belden vs. Chase*, 150 U. S. 674;

*The Mar Marris*, 137 U. S. 1;

*The Atlee*, 21 Wall. 389.

If the application by the state courts of their own contributory negligence doctrine does not "modify or displace essential features of the substantive maritime law," (nor interferes with its proper harmony and uniformity), we are at a loss to understand why the application of the local fellow-servant rule should

result in such modification, displacement, or diversity.

In answer to the contention that such application of the local fellow-servant rule would constitute an interference with maritime matters, we call attention to the fact that state laws relating to matters of local concern, incidentally effecting maritime affairs, (but not working material prejudice to the characteristic features of the general maritime law), have been repeatedly upheld by the court.

*Knapp S. & Co. vs. McCaffrey*, 177 U. S. 638;

*Rounds vs. Cloverport Foundry & Mach. Co.*, 237 U. S. 303;

*Southern Pac. Co. vs. Jensen*, 244 U. S. 205, (Dissenting Opinions of Mr. Justice Holmes and Mr. Justice Pitney);

*Grant Smith-Porter Ship Co. vs. Rhode*, 257 U. S. 439;

*Western Fuel Co. vs. Garcia*, 257 U. S. 233;

*Great Lakes Dredge & Dock Co. vs. Kierjewski*, 261 U. S. 479;

*Washington vs. Dawson & Co.*, 264 U. S. 219, (Dissenting Opinion of Mr. Justice Brandeis);

*Red Cross Line vs. Atlantic Fruit Co.*, 264 U. S. 109;

*Millers Indemnity Underwriters vs. Brand*, 70 L. Ed.—Sup. Ct. Adv. Op. Vol. 8, p. 221.

In *The City of Norwalk*, 55 Fed. 98, 106, Judge Brown enumerates eleven other "instances \* \* \* in which *new legal rights*, created by state authority in maritime affairs, have been recognized and enforced \* \* \*

"First, liens for *supplies* to domestic vessels, (*The Lettawanna*, 21 Wall. 558;) second, liens for master's *wages* (*The Mary Gratwick*, 2 Sawy. 342, affirmed by Mr. Justice Field; the *Louis Olson*, 52 Fed. Rep. 652; the *J. E. Rumbell*, 13 Sup. Ct. Rep. 498;) *third*, liens for damages for *refusing to load* under a charter, (*J. F. Warner*, 22 Fed. Rep. 342, by Mr. Justice Brown;) fourth, liens for *double wharfage* (*The Virginia Rulon*, 13 Blatchf. 519;) fifth, action for half pilotage where a pilot's services were *refused*, (*Ex Parte McNeil*, 13 Wall. 236 and *Ex Parte Hagar*, 104 U. S. 520, re-affirming *Cooley vs. Port Wardens*, supra;) sixth, liens for expenses of seamen at a quarantined *hospital*, (*The Wensleydale*, 41 Fed. Rep. 829;) seventh, regulations as to *rivers, harbors, and wharves* (*County of Mobile vs. Kimball*, supra; *Escanaba & L. M. Transport Co. vs. Chicago*, 107 U. S. 678, 2 Sup. Ct. Rep. 185; *Transportation Co. vs. Parkersburg*, 107 U. S. 691, 701, 704, 2 Sup. Ct. Rep. 732; *Packet Co. vs. Keokuk*, 95 U. S. 80; *Packet Co. vs. Aiken*, 121 U. S. 444, 7 Sup. Ct. Rep. 907; *Steamship Co. vs. Penn.* 122 U. S. 326, 346, 347, Sup. Ct. Rep. 1118;) eighth, *penalties* imposed for the protection of *fisheries*, (*Manchester vs. Mass.*, supra; *Smith vs. State of Maryland*, 18 How. 71;) ninth, *quarantine laws*, (*Morgans L. & Tr. & S. S. Co. vs. Louisiana Board of Health*, 118 U. S. 455, 6 Sup. Ct. Rep. 1114) tenth, regulating the charges of floating elevators, (*Budd vs.*

doubtedly sound as applied to seamen. *Schuede vs. Zenith S. S. Co.*, 216 Fed. 566. But plainly the maritime doctrine of wages, maintenance and cure is not applicable to *longshoremen*. There is no "well recognized maritime rule concerning the measure of recovery" applicable to them. Indeed, until the decision of this court in *Atlantic Transport Co. vs. Imbrovek* (1914) it was doubted whether an admiralty court even had jurisdiction of a suit by a longshoreman against his employer to recover damages for personal injuries, where, (as in the case at bar), neither the vessel nor her owners were parties thereto.

*Campbell vs. Hackfield & Co.*, 125 Fed. 696 (C. C. A. 9th).

The rights of longshoremen and the liabilities of their masters have always been measured by common law principles, even in admiralty.

*The Buffalo*, 154 Fed. 815 (C. C. A. 2nd);

*Atlantic Transport Co. vs. Imbrovek*, 234 U. S. 521, 50 L. Ed. 1208;

*The Kinghorn*, 297 Fed. 621;

*Seibert vs. Patapsco Ship Ceiling & Stev. Co.*, 253 Fed. 685;

*Jacobson vs. Rothschild*, 62 Wash. 127;

*Westerlund vs. Rothschild*, 53 Wash. 626;

*Lund vs. Griffiths-Sprague Stev. Co.* 108 Wash. 220;

*Norman vs. Ship Owners Stev. Co.*, 59 Wash. 244.

The reason why the rights of seamen are determined by the maritime rules while those of long-shoremen and other landsmen who are temporarily employed aboard a vessel, are measured by common law principles, is aptly stated by the Court of Appeals of New York in *Maleeny vs. Standard Ship Building Corp.* 237 N. Y. 250, 142 N. E. 602, 606:

"The appellate division also in *Kennedy vs. Cunard S. S. Co.*, 197 App. Div. 459, 189 N. Y. S. 402, held that the rules relating to contributory negligence must be determined by the maritime law and not by the common law. This followed, so its opinion states, the determination in *Chelentis vs. Luckenbach S. Co. Inc.*, 247 U. S. 372, 38 Sup. Ct. 501, 62 L. Ed. 1171. The distinction, however, the appellate division failed to notice between seamen and the ordinary land-servant temporarily working on a ship, such as a stevedore, painter or mechanic. *The law of the Chelentis case*, the *Osceola*, 189 U. S. 158, 23 Sup. Ct. 483, 47 L. Ed. 760, and *Carlisle Packing Co. vs. Sandanger*, 259 U. S. 255, 42 Sup. Ct. 475, 66 L. Ed. 927, was applied to the peculiar relationship existing between the members of the crew of a vessel and the owner..

"The nature of a seamen's contract is such that unless the vessel be unseaworthy or there be a failure to supply and keep in order the proper appliances, appurtenant to a ship, a seamen for an injury received is only entitled to his maintenance and cure and to his wages, at least so long as the voyage is continued. For disobedience



to orders he may be locked up or put in irons. *These rules of maritime law, applicable to seamen and members of the crew, and so restricted by these decisions, have no application to shore-servants working on docked ships.* The instances where such servants like stevedores have recovered damages for injuries received through negligence while working on ships, are so numerous both in admiralty and in state courts that citations are unnecessary." (Italics ours).

There is nothing in the language of the Chelentis decision indicating that the law of that case is applicable to longshoremen. On the contrary it clearly appears that the law thereof is restricted to seamen.

#### IV.

##### **THE FELLOW SERVANT DOCTRINE INVOKED BY PETITIONER IS AN OBSOLETE COMMON LAW RULE.**

The fellow-servant rule which the petitioner conceives to be a *maritime* principle, applicable to this case, is but an obsolete *common law* rule of 1841. (18 R. C. L. 715-717, 730-731).

It was first applied by a court of admiralty in *Halvorsen vs. Nisen*, 3 Sawyer, 562, 11 Fed. Cas. 310, which cites as authority common law decisions. (See: "*The Extension to the Admiralty of the Fellow-Servant Doctrine*" by Frederick Cunningham, 18 Har. Law Rev. 294, 295).

When the common law courts modified the fellow-servant rule by engrafting upon it the vice principal

doctrine, the admiralty courts adopted the modification.

*Atlantic Transport Co. vs. Imbrovek*, 234 U. S. 52;

*Port of New York Stev. Corp. vs. Castagna*, 280 Fed. 618; (C. C. A. 2nd); (Certiorari denied, 66 L. Ed. 801);

*Pacific American Fisheries vs. Hoof*, 291 Fed. 306, (C. C. A. 9th); (Certiorari denied, 68 L. Ed. 521);

*The Kinghorn*, 297 Fed. 621 (CCA 2nd);

*Carter et al. vs. Brown*, 212 Fed. 393 (C. C. A. 5th);

*Alaska S. S. Co. vs. Egan*, 202 Fed. 867 (C. C. A. 9th);

*The Portland*, 213 Fed. 699;

*Vanier vs. Sweet*, 243 Fed. 939;

*Seibert vs. Patapsco Ship Ceiling & Stev. Co.*, 253 Fed. 685.

Congress has twice repudiated the fellow-servant doctrine as applied to seamen.

Section 20, Act. of March 4, 1915, 38 Stat. at L. Chap. 153, page 1185, and Section 33 of Act of June 5, 1920, Chap. 250, 41 Stat. at L. 1007. (Construed in *Panama R. R. vs. Johnson*, 264 U. S. 375).

For the foregoing reasons the fellow-servant rule invoked by the petitioner cannot be deemed a "characteristic feature of the general maritime law."

## CONCLUSION

In conclusion it is respectfully submitted: (1) that the Supreme Court of the State of Washington erred in holding that the state court must be governed by the decisions of the admiralty courts in determining whether the hatch-tender was respondent's fellow-servant. (2) That no injury could have resulted to the petitioner's rights by reason of the error because under the well established common law rule of the State of Washington the hatch-tender was a vice principal.

*Carlisle Packing Co. vs. Sandanger*, 259 U. S. 255.

The judgment should be affirmed.

Respectfully submitted,

ARTHUR E. GRIFFIN,

GEORGE F. VANDERVEER,

SAMUEL B. BASSETT,

*Amici Curiae.*